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42
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

STATE OF IDAHO.

By I. W. HART.
(Ex-officio Reporter.)

VOLUME 12.

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CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO.

(January 25, 1906.)

ALMA D. KATZ, Appellant, v. C. E. HERRICK, Respondent.

[86 Pac. 873.]

FOREIGN CORPORATIONS—COMPLIANCE WITH LAWS PRECEDENT TO DOING BUSINESS — INSURANCE COMPANIES — CONSTITUTIONAL REQUIREMENT—POLICY OF THE STATE—CONTRACTS IN VIOLATION OF LAW CANNOT BE ENFORCED—TITLE TO LEGISLATIVE ACT—CURATIVE OR RETROSPECTIVE ACT—PURCHASER WITH NOTICE.

1. Under the provisions of section 10, article 11 of the constitution, and section 2653 of the Revised Statutes as amended by act of March 10, 1903, it is made unlawful for any foreign corporation to transact business in this state without having first filed a copy of its articles of incorporation with the Secretary of State and the county recorder of the county in which its principal place of business is established, and having also in like manner filed written appointment designating and authorizing an agent within the state to receive and accept service of process in any and all matters in which the corporation may be a party or concerned.

2. A foreign corporation failing to comply with the requirements of the constitution and of section 2653 of the Revised Statutes, as amended by act of March 10, 1903, cannot maintain a suit or action in any of the courts of this state for breach or violation of any contract entered into during the time the corporation had so failed and neglected to comply with the constitution and statute.

3. The people in adopting section 10, article 11 of the constitution have clearly announced the public policy of this state toward foreign corporations, and have proclaimed in unmistakable language that such artificial beings, existing only in contemplation of law, must subject themselves to the jurisdiction and laws of this state

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Points Decided.

before they can be accorded any recognition or legal existence within its jurisdiction.

4. Where the constitution or statute prohibits an act or declares that it shall be unlawful to perform it, it is the fair and reasonable interpretation and construction thereof to say that the people in the one case and the legislature in the other have intended to interpose their power and authority to prevent the act, and as one of the means of its prevention intended that the courts should not lend their power and authority in its enforcement.

5. As to whether or not the act of February 8, 1905, entitled "An act relating to foreign corporations doing business in the state of Idaho," is in violation and contravention of section 10, article 11 of the constitution, *quære*.

6. Where the sole purpose and object of a legislative act is the validating and legalizing of the past transactions of a foreign corporation which has done business in this state without having first complied with the provisions of the constitution and statute in filing its articles of incorporation and designating an agent upon whom service of process may be had, and the title to such act is, "An act relating to foreign corporations doing business in the state of Idaho": *Held*, that the title does not express or indicate the subject matter of the act, and does not comply with section 16 of article 3 of the constitution, and that such act is for that reason unconstitutional and void.

7. Act of February 8, 1905, entitled "An act relating to foreign corporations doing business in the state of Idaho," is a retrospective and retroactive law, and is in that respect out of the usual and ordinary scope of legislation, and such act should have a title indicating in some manner the retroactive intent and operation of the statute.

8. Where K. was at all times mentioned the agent and manager of a foreign insurance company which was doing business in this state without having first complied with the requirements of section 10 of article 11 of the constitution, and section 2653 of the Revised Statutes, as amended by act of March 10, 1903, and a solicitor for such company took H.'s promissory note in payment of a premium on a policy of life insurance, and thereafter assigned such note to K., on which K. advanced him the amount of his commission, and the solicitor thereupon agreed to repay K. in case H., the maker of the note, failed to pay the same: *Held*, that K. was not an innocent purchaser of the note for value.

(Syllabus by the court.)

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. George H. Stewart, Judge.

Argument for Appellant.

Judgment for defendant. Plaintiff appealed. *Affirmed.*

Edwin Snow and Harry S. Kessler, for Appellant.

The company is not prohibited from doing business during noncompliance with the foreign corporation act of 1903. No penalty or punishment is prescribed for doing business. It is not made a crime, but the act itself clearly sets out what result is to follow. No contract or agreement made in the name of or for the use or benefit of such corporation prior to the making of such filings can be sued upon or be enforced in any court of this state by such corporation.

Notes taken by foreign insurance companies within this state are not void because they have not complied with the laws authorizing them to do business within its limits, but the remedy upon such notes is suspended until they do comply with said laws. (*American Ins. Co. v. Wellman*, 69 Ind. 413.) This is construing a law which expressly prohibits companies from doing business in the state without compliance and which fixes a criminal penalty for failure to do so.

Policy of insurance itself is valid, notwithstanding the company has not complied with the law. (*Berry v. Knight Templars etc. Indemnity Co.*, 46 Fed. 439; *Ehrman v. Teutonia Ins. Co.* (D. C.), 1 Fed. 471, 1 McCrary, 123; *Ganser v. Fireman's Fund Ins. Co.*, 34 Minn. 372, 25 N. W. 943; *Marshall v. Reading Ins. Co.*, 29 N. Y. Supp. 334, 78 Hun, 83.)

New Hampshire courts have held that if the policy is valid, the premium note is valid, even though the foreign corporation and its agents had laid itself open to criminal liability by writing policies before they had complied with the law. (*Union Ins. Co. v. Smart*, 60 N. H. 458; *Connecticut River Ins. Co. v. Way*, 62 N. H. 622; *Provincial Life Ins. Co. v. Lapsley*, 15 Gray (Mass.), 252.)

A contract is not void when the statute at the same time otherwise limits the effect or declares the consequences which shall attach to the making of the contract. (9 Cyc. 481,

Argument for Respondent.

Philadelphia Loan Co. v. Tower, 13 Conn. 249; *Rossman v. McFarland*, 9 Ohio St. 369.)

Davidson & Stoutemyer, for Respondent.

That this contract is absolutely void as to appellee we entertain no doubt. (*Cincinnati Mutual Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626.)

This construction of such statutes is supported by the overwhelming weight of authority. (3 Clark and Marshall on Private Corporations, par. 847b; *In re Comstock*, 3 Saw. 218, Fed. Cas. No. 3078; *Semple v. Bank of British Columbia*, 5 Saw. 88, Fed. Cas. No. 12,659; *Northwestern Mutual Life Ins. Co. v. Elliott*, 5 Fed. 225, 7 Saw. 17; *McCanna & Fraser Co. v. Citizens' Trust etc. Co.*, 74 Fed. 597; *Diamond Glue Co. v. United States Glue Co.*, 103 Fed. 838; *Farrior v. New England Mortgage Security Co.*, 88 Ala. 275, 8 South. 200; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *Union Central Life Ins. Co. v. Thomas*, 46 Ind. 44; *Cassady v. American Ins. Co.*, 72 Ind. 95; *Franklin Ins. Co. v. Louisville etc. Packet Co.*, 9 Bush (Ky.), 590; *Buxton v. Hamblen*, 32 Me. 448; *Williams v. Cheney*, 8 Gray (Mass.), 206; *National Mutual Fire Ins. Co. v. Pursell*, 10 Allen (Mass.), 231; *Reliance Mutual Ins. Co. v. Sawyer*, 160 Mass. 413, 36 N. E. 59; *Seamans v. Temple Co.*, 105 Mich. 400, 55 Am. St. Rep. 457, 63 N. W. 408, 28 L. R. A. 430; *Seamans v. Christian Bros. Mill Co.*, 66 Minn. 205, 68 N. W. 1065; *Williams v. Scullin*, 59 Mo. App. 30; *Barbor v. Boehm*, 21 Neb. 450, 32 N. W. 221; *Stewart v. Northampton Mutual Live Stock Ins. Co.*, 38 N. J. L. 436; *Pennington v. Townsend*, 7 Wend. (N. Y.) 276; *Bank of British Columbia v. Page*, 6 Or. 435; *Hacheny v. Leary*, 12 Or. 40, 7 Pac. 329; *Thorne v. Travelers' Ins. Co.*, 80 Pa. St. 15, 21 Am. Rep. 89; *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743.)

The illegality of the transaction may be set up as against a holder of the note or bond who has not paid value, or who purchased with notice. (3 Clark and Marshall on Private Corporations, sec. 847h; *Jones v. Smith*, 3 Gray (Mass.), 500;

Argument for Appellant (*Amici Curiae*).

Atlantic Mut. Fire Ins. Co. v. Fitzpatrick, 2 Gray (Mass.), 279; *Roche v. Ladd*, 1 Allen (Mass.), 437; *Ehrhardt v. Robertson Bros.*, 78 Mo. App. 404; *Warren v. Stoddard*, 6 Idaho, 692, 59 Pac. 540.)

The validating act of 1905 is unconstitutional under section 16, article 3, of the constitution of the state of Idaho. The title of this act is, "An act relating to foreign corporations doing business in the state of Idaho." The legalization of past transactions is not within the title of the statute which states that it is to regulate the business of building and loan associations. (*Lindsay v. United States Sav. etc. Co.*, 120 Ala. 156, 24 South. 171, 42 L. R. A. 783. See, also, *Brieswick v. Brunswick*, 51 Ga. 639, 21 Am. Rep. 240; *Lockport v. Gaylord*, 61 Ill. 276; *Snell v. Chicago*, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858.)

W. E. Borah, James E. Babb, John P. Gray, C. L. Heitman and Stiles W. Burr, *amici curiae*.

The object of penalty provisions, especially those which strike at the validity of the corporation's acts and contracts and those which deny it access to the courts, is to compel compliance by the corporation with the state's requirements, not to punish the corporation nor to deprive it of its property or property rights; such penalties are not enacted for the benefit of persons who contract with such corporation, pocket the consideration, and then seek to evade their obligation. Forfeitures are never favored, and this rule applies with special force to statutes of this character. The greatest force of these considerations is in cases dealing with the construction and validity of legislative enactments affirmatively relieving such corporations from the consequences of a default of this sort. (*Caesar v. Capell*, 83 Fed. 403 (417, 426); *Wright v. Lee*, 4 S. Dak. 237, 55 N. W. 931; *Carson-Rand Co. v. Stern*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420; *Chicago Mill etc. Co. v. Sims*, 101 Mo. App. 569, 74 S. W. 128; Thompson on Corporations, secs. 7955, 7956; *State v. American Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A., N. S., 1041; 19 Cyc.

Argument for Appellant (*Amici Curiae*).

1298; *Eastern Bldg. etc. Assn. v. Bedford*, 88 Fed. 7; *Washburn Mill Co. v. Bertlett*, 3 N. Dak. 138, 54 N. W. 544; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893.)

Where the legislature has obeyed the mandate of the constitution by enacting statutes prescribing the manner in which the constitutional requirements shall be complied with, and providing explicit penalties for noncompliance, the statutory penalties will be held exclusive, and no additional penalty, invalidating the contract itself, will be implied from the constitutional prohibition. (*Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; *Wright v. Lee*, 2 S. Dak. 596, 51 N. W. 706, and 4 S. Dak. 237, 55 N. W. 931; *Kindel v. Lithographing Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; *La France Fire Eng. Co. v. Town of Mt. Vernon*, 9 Wash. 142, 43 Am. St. Rep. 827, 37 Pac. 287, 38 Pac. 80; *Caesar v. Capell*, 83 Fed. 403; *Jarvis-Conklin Mtg. Co. v. Willhoit*, 84 Fed. 514; *Pennypacker v. Capital Inv. Co.*, 80 Iowa, 56, 20 Am. St. Rep. 395, 45 N. W. 408, 8 L. R. A. 236; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327; *Louisville Property Co. v. Mayor*, 114 Tenn. 213, 84 S. W. 810; *Lumberman's Mut. Ins. Co. v. Kansas City etc. Ry. Co.*, 149 Mo. 165, 50 S. W. 281; *Buffalo Zinc Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572; *Garrett Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187, 78 Am. St. Rep. 852, 37 Atl. 948, 38 L. R. A. 545.)

In the absence of an express declaration that the contract shall be void (which in the Idaho statute applies only to a conveyance of real estate), the result is merely to effect a suspension of remedy; and a subsequent compliance with the law by the corporation will validate the obligation and render it enforceable in law. (*Carson-Rand Co. v. Stern*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420; *Buffalo Zinc Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572; *Phoenix Ins. Co. v. Pennsylvania Co.*, 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405; *Chicago Mill Co. v. Sims*, 101 Mo. App. 569, 74 S. W. 128; *Neuchatel Asphalt Co. v. New York*, 155 N. Y. 373, 49 N. E. 1043; *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*,

Argument for Appellant (*Amici Curiae*).

6 Wash. 122, 32 Pac. 1073; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 93; *Eastern Bldg. Assn. v. Bedford*, 88 Fed. 7; *Wright v. Lee*, 4 S. Dak. 231, 55 N. W. 931; *Nat. Mut. Fire Ins. Co. v. Pursell*, 10 Allen, 231.)

There is absolutely nothing in the act which is not clearly comprehended in and covered by the title, or which is in the slightest degree foreign to or inconsistent with it.

Under the constitutional provision it is not necessary that the title should do more than indicate the general subject with which the act deals, which subject may be referred to in the broadest possible terms. (*Montclair v. Ramsdell*, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391; *Pioneer Irr. Dist. v. Bradbury*, 8 Idaho, 310, 101 Am. St. Rep. 20, 68 Pac. 295; *State v. Doherty*, 3 Idaho, 384, 29 Pac. 855; *State v. Jones*, 9 Idaho, 693, 75 Pac. 819; *Montgomery v. Robinson*, 69 Ala. 413; *People v. Lawrence*, 36 Barb. 177 (192); *Brewster v. City of Syracuse*, 19 N. Y. 116; *People v. Hazelwood*, 116 Ill. 319, 6 N. E. 480; *Seattle Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845; *Deyoe v. Superior Court*, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28; *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *People v. Superior Court*, 100 Cal. 105, 34 Pac. 492; *Johnson v. Harrison*, 47 Minn. 575, 28 Am. St. Rep. 282, 50 N. W. 923; *People v. Parvin* (Cal.), 14 Pac. 783.)

The word "subject," as used in the constitution, is not synonymous with provisions. (*Mexican Nat. R. Co. v. Jackson*, 118 Fed. 549, 55 C. C. A. 315; *Matter v. Mayer*, 50 N. Y. 504.)

The constitution of Indiana is identical with our own in this particular, so that the following cases are of special interest: *Bright v. McCullough*, 27 Ind. 223; *Clarke v. Darr*, 156 Ind. 692, 60 N. E. 688; *Kane v. Woods*, 78 Ind. 103. See, also, *Cardillo v. People*, 26 Colo. 355, 58 Pac. 678; *People v. Briggs*, 50 N. Y. 553; *Jonesboro v. Cairo etc. R. Co.*, 110 U. S. 192, 28 L. ed. 116, 4 Sup. Ct. Rep. 67; *People v. Lowenthal*, 93 Ill. 191; *Hellman v. Shoulters*, 114 Cal. 150, 45 Pac. 1057, 44 Pac. 915; *Sun Mut. Ins. Co. v. Mayor*, 8 N.

Argument for Appellant (*Amici Curiae*).

Y. 241; *State v. Frazier*, 36 Or. 178, 59 Pac. 5; *State v. Town of Union*, 33 N. J. L. 350; *People v. Gas Light Co.*, 205 Ill. 482, 98 Am. St. Rep. 244, 68 N. E. 950; *People v. Mullenden*, 132 Cal. 217, 64 Pac. 299; *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251; *People v. Banks*, 67 N. Y. 568; *Seymour v. City of Tacoma*, 6 Wash. 138, 32 Pac. 1077; *Lancey v. King Co.*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817; *In re Pinkney*, 47 Kan. 89, 27 Pac. 179; *State v. Hilderbrand*, 62 Neb. 134, 87 N. W. 25; *Powers v. McKinzie*, 90 Tenn. 167, 16 S. W. 559; *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033; *Boyer v. Fire Eng. Co.*, 124 Mich. 455, 83 Am. St. Rep. 338, 83 N. W. 124; *Western Ranches v. Custer County*, 28 Mont. 278, 72 Pac. 659; *Burton v. Snyder*, 22 Colo. 173, 43 Pac. 1004; *Otoe Co. v. Baldwin*, 111 U. S. 1, 28 L. ed. 331, 4 Sup. Ct. Rep. 265; *Carter v. Sinton*, 120 U. S. 517, 30 L. ed. 701, 7 Sup. Ct. Rep. 650; *Hingle v. State*, 24 Ind. 28; *People v. Louren*, 119 Cal. 88, 51 Pac. 22, 638; *Supervisors v. Railroad Co.*, 25 Ill. 181; *Mollie Gibson Min. Co. v. Sharp*, 23 Colo. 259, 47 Pac. 266; *State v. Campbell*, 50 Kan. 433, 32 Pac. 35; *In re Pratt*, 19 Colo. 138, 34 Pac. 680; *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142; *Wishmier v. State*, 97 Ind. 161; *Maule Coal Co. v. Partcheimer*, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710; *Commissioners v. Dwight*, 101 N. Y. 9, 3 N. E. 782; *Johnson v. Wood*, 19 Wash. 441, 53 Pac. 707; *In re Magnes' Estate*, 32 Colo. 527, 77 Pac. 853; *State v. County Court*, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23; *State v. Power*, 63 Neb. 496, 88 N. W. 769; *Fleishman v. Walker*, 91 Ill. 318; *Paxton Irr. Co. v. Farmers' Irr. Co.*, 45 Neb. 884, 64 N. W. 343; *State v. Cantwell*, 179 Mo. 245, 78 S. W. 569; *State v. Wilson*, 80 Tenn. 246; *City of La Harpe v. Fuel etc. Co.*, 69 Kan. 97, 76 Pac. 448; *State v. Whittlesey*, 17 Wash. 447, 50 Pac. 119; *Johnson v. People*, 83 Ill. 431; *State v. Dickerman*, 16 Mont. 278, 40 Pac. 698; *State v. Anaconda Min. Co.*, 23 Mont. 498, 59 Pac. 855; *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520; *Lien v. Board of Commrs.*, 80 Minn. 58, 82 N. W. 1094; *People v. Phippin*, 70 Mich. 6, 37 N. W. 888. As to the propriety of the use of

Argument for Appellant (*Amici Curiae*).

the term "foreign corporations" in the title of the act of 1905, see recent case of *Anglo-Californian Bank v. Field*, 146 Cal. 600, 80 Pac. 1080.

The title of an act containing curative provisions of retrospective effect need not definitely indicate the presence of such retrospective provisions and their retroactive intent and operation. (*Hope v. City of Gainesville*, 72 Ga. 246; *Bonner v. Milledgeville Ry. Co.*, 123 Ga. 115, 50 S. E. 973; *Mahomet v. Quackenbush*, 117 U. S. 508, 29 L. ed. 982, 6 Sup. Ct. Rep. 858; *Jonesboro v. Cairo etc. R. Co.*, 110 U. S. 1921, 28 L. ed. 116, 4 Sup. Ct. Rep. 67; *Unity v. Burtage*, 103 U. S. 447, 26 L. ed. 405 (the last three cases pass on the title of Illinois act); *Detroit v. Detroit Citizens' R. Co.*, 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Anderson v. Santa Ana*, 116 U. S. 358, 29 L. ed. 633, 6 Sup. Ct. Rep. 413; *Nottage v. City of Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883; *City of Leavenworth v. Water Co.*, 69 Kan. 82, 76 Pac. 451; *Bosang v. Loan Assn.*, 96 Va. 119, 30 S. E. 440; *State v. Town of Union*, 33 N. J. L. 350; *Morris v. State*, 62 Tex. 728; *Iowa Sav. etc. Assn. v. Selby*, 111 Iowa, 402, 82 N. W. 968; *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 31 L. ed. 543, 8 Sup. Ct. Rep. 643; *Borough of New Brighton v. Bidwell*, 201 Pa. St. 96, 50 Atl. 989; *Donnelly v. City of Pittsburg*, 147 Pa. St. 348, 30 Am. St. Rep. 738, 23 Atl. 394; *State v. Starkey*, 49 Minn. 503, 52 N. W. 24; *State v. Gunn*, 92 Minn. 436, 100 N. W. 97; *Commissioners v. Dwight*, 101 N. Y. 9, 3 N. E. 782; *People v. Sutphin*, 166 N. Y. 163, 59 N. E. 770; *Hardenburg v. Von Keuren*, 4 Abb. N. C. (N. Y.) 43; *Rader v. Township of Union*, 39 N. J. L. 509; *Kennedy v. Belmar*, 61 N. J. L. 20, 38 Atl. 756; *Harrison v. Supervisors of Milwaukee Co.*, 51 Wis. 645, 8 N. W. 731; *Worthen v. Badgett*, 32 Ark. 496; *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. 86; *Mutual Benefit Life Ins. Co. v. Winne*, 20 Mont. 20, 49 Pac. 446; *Butler v. City of Lewiston*, 11 Idaho, 393, 83 Pac. 234.)

The language regarding retrospective legislation quoted by the Alabama court in *Lindsay v. United States Loan Assn.*,

Argument for Appellant (*Amici Curiae*).

120 Ala. 156, 24 South. 171, 42 L. R. A. 783, and by this court from that decision in its original opinion, applies to the construction of statutes themselves and not to the matter of their titles.

Another comment which might be made on the Lindsay case is that the Alabama constitution requires the subject of the act to be "clearly" expressed in the title. This word does not appear in the Idaho constitution.

W. B. Heyburn and John P. Gray, *amici curiae*, cite many of the authorities cited in the preceding brief on the question of sufficiency of title, and, in addition, *Kleckner v. Turk*, 45 Neb. 176, 63 N. W. 469; *Mobile Trans. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 643, 30 South. 645, 64 L. R. A. 333.

Unless a penalty is attached declaring that the agreement and deeds of the corporation shall be void, then only the state can take advantage of the failure of the corporation to comply with a constitutional or statutory provision requiring them to designate an agent upon whom process may be served. (*Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93.)

This case went up from Colorado. The Colorado constitution, article 15, section 10, is word for word the same as section 10, article 11 of the Idaho constitution, and the supreme court of the United States, after carefully considering the question, held that the failure to comply with the constitutional provision did not render a deed to a foreign corporation void so that it could be collaterally attacked by a private person, but held that the state alone could pursue a corporation for failure to comply with the constitutional provision.

The courts have uniformly avoided the drastic consequences of acts such as the act of 1903, where it has been possible for them to do so. (*Chattanooga etc. Co. v. Evans*, 66 Fed. 815, 14 C. C. A. 116.)

M. A. Folsom and J. E. Blair, *amici curiae*.

The act of 1905, known as the curative act, was unconstitutional by reason of its conflict with section 16, article 3 of

Argument for Respondent (*Amici Curiae*).

the Idaho constitution. Its subject matter is not foreign corporations generally, but the contracts of foreign corporations with other parties, specifically. There is nothing in the title to indicate that the act was to cure the violations of the act of 1903.

In the following cases the general topic suggested by the title was held to be different in meaning from the specialized subject treated in the body of the act. (*McNeely v. Oil Co.*, 52 W. Va. 616, 44 S. E. 517, 62 L. R. A. 562; *Lewis v. Dunne*, 134 Cal. 291, 86 Am. St. Rep. 257, 66 Pac. 480, 55 L. R. A. 833; *Clark v. Commissioners*, 54 Kan. 634, 39 Pac. 226; *In re Snyder*, 108 Mich. 48, 65 N. W. 562; *Beverly v. Waln*, 57 N. J. L. 143, 30 Atl. 545; *Rader v. Union Township Committee*, 39 N. J. L. 515.)

The case of *Lindsay v. United States Sav. etc. Co.*, is squarely in point. The title was, "An act to regulate the business of building and loan associations." In our case the title is practically the same, "An act relating to foreign corporations doing business in this state." In both cases certain past transactions are attempted to be validated. And the Idaho statute is more radical than the Alabama statute.

The case of *Brieswick v. Brunswick*, 51 Ga. 639, 21 Am. Rep. 240, goes much further than is necessary for this court to go, for there, as in the Lindsay case, there were many other general and special provisions as to the incorporation of the town to which the special provision might have been argued to be properly related, and so comprehended under the title therein. Nor was this case "squarely overruled by the later decisions of the supreme court of Georgia, for the Hope case and the Bonner case are wholly dissimilar in their facts. *Snell v. Chicago*, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858, expressly follows *Lockport v. Gaylord*, 61 Ill. 276, showing that the Illinois court does not regard the other Illinois cases as affecting the decision of the Lockport case, or as contradictory to it. *Snell v. Chicago*, *supra*, is a later case than any of those cases decided by the supreme court of the United States from Illinois. In *Mahomet v. Quackenbush*, 117 U. S.

Argument for Respondent (*Amicus Curiae*).

508, 29 L. ed. 982, 6 Sup. Ct. Rep. 858, *Jonesboro v. Cairo Ry. Co.*, 110 U. S. 192, 28 L. ed. 116, 4 Sup. Ct. Rep. 67, *Town of Unity v. Burrage*, 103 U. S. 447, 26 L. ed. 405, the supreme court was merely seeking to find the rule in Illinois, and, accordingly, expressed no independent opinion. On the other hand, these earlier cases have been questioned directly in Illinois courts. (*Middleport v. Ins. Co.*, 82 Ill. 562; *People v. Brislin*, 80 Ill. 423; *Welch v. Post*, 99 Ill. 474.)

The cases cited in brief of Messrs. Borah et al., from *Montclair v. Ramsdell*, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391, are cases of titles expressed in general terms followed by a general treatment. In such cases "the generality of the title is not fatal to the act." Here the title is expressed in general terms, not followed by a general treatment, but by a treatment so highly specialized that it constitutes something wholly different from the "subject" or "object" stated in the title.

James E. Babb, *amicus curiae*.

If the basis on which the controversy has proceeded, viz., that the statute is exclusively a retrospective one, had any foundation in fact, the question would be as to the sufficiency of a statute exclusively retrospective, enacted under a title general in terms. A determination of such a controversy is found in *State v. Jones*, 9 Idaho, 693, 75 Pac. 819.

In the case of *Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19, retrospective provisions of a statute enacted under a general title were declared effective.

The New Jersey and other authorities cited in the brief of Folsom & Blair, under the heading, "Cases of general title without general treatment," have been expressly disapproved, *Cardillo v. People*, 26 Colo. 335, 58 Pac. 678, and in practical effect by *Jackson v. Baehr*, 138 Cal. 266, 71 Pac. 167, and have been distinguished in late New Jersey cases. (*Kennedy v. Belmer*, 61 N. J. L. 20, 38 Atl. 756; *Jackson v. Asbury Park*, 60 N. J. L. 515, 64 Am. St. Rep. 600, 39 Atl. 693.)

Statement of Facts.

STATEMENT OF FACTS.

This action was instituted by the appellant, Alma D. Katz, on a promissory note executed by the defendant, C. E. Herrick. The note was given in payment for the first annual premium on a policy of insurance issued by the Mutual Life Insurance Company of New York, in favor and on the life of the defendant. This note was made payable "to the order of himself at the office of the Mutual Life Insurance Company, Boise, Idaho," and was indorsed "C. E. Herrick." The defendant in his answer admitted the execution and delivery of the note to the agent of the Mutual Life Insurance Company, and that the same was made and delivered in payment of the first annual premium on a policy of insurance issued in his favor. The defendant pleaded as a bar to the right of recovery that the Mutual Life Insurance Company is a foreign corporation organized and existing under the laws of the state of New York, and doing business within the state of Idaho, and that it "has wholly failed, refused and neglected to comply with the provisions of an act of the seventh session of the legislature entitled, 'An act amending title 4, section 2653, of the Revised Statutes of Idaho, concerning corporations,' approved the 10th day of March, 1903; that said Mutual Life Insurance Company of New York has wholly failed, refused and neglected, within three months after the taking effect of said act, or at any time or at all, to file in the office of the recorder of Ada county, Idaho, or in the office of the recorder of any county in the state of Idaho, any designation of the county within the state of Idaho in which its principal business in the said state of Idaho shall be conducted." It also alleges the failure and refusal of the company to file a copy of its articles of incorporation with the Secretary of State as required by the provisions of the act. The defendant further alleges that the plaintiff was at all times mentioned in his complaint the agent and manager of the Mutual Life Insurance Company, within the state of Idaho, and in charge of its business in this state, and that he had notice of the consideration and purpose for which the

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note was given, and that he was not a *bona fide* purchaser of the note for value. The case was submitted to the district court upon a stipulation of facts in which it was agreed that the note was given in payment of the annual premium on a policy of insurance issued by the Mutual Life Insurance Company. It was also agreed that the company had failed and neglected to comply with the act of March 10, 1903, within three months after the approval thereof, but that it "thereafter complied with the provisions of the act after the commencement of this action." It was further admitted that "the plaintiff, if present, would testify that the Mutual Life Insurance Company of New York does not receive or take promissory notes in settlement of the premiums of its policies of insurance, and that its agents and solicitors are charged with the premium or premiums due on policies sold by them, and that whenever the said agents or solicitors accept or take promissory notes in payment of premiums on policies of insurance, they are taken and carried by the agent himself." It is further agreed that the plaintiff, if present, would testify that the Mutual Life Insurance Company has no interest in the note sued on, and that plaintiff received the same from the agent or solicitor of the company by advancing to such agent his commissions on the policy for which the note was given, and that the note was assigned to plaintiff with the understanding that plaintiff should have recourse on the agent in case the note was not paid.

AILSHIE, J. (After making the statement.)—The first question to be determined by us in this action is whether or not, under the constitution and laws of Idaho, a foreign corporation can maintain an action in the courts of this state for the breach of a contract entered into by such corporation within the state without first having complied with the constitution and statute in filing a copy of its articles of incorporation, and designating a statutory agent upon whom service of process can be made. Section 10 of article 11 of the constitution provides: "No foreign corporation shall do any business in this state without having one or more known

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places of business, and an authorized agent or agents in the same, upon whom process may be served, and no company or corporation formed under the laws of any other country, state or territory, shall have or be allowed to exercise or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of this state." Section 2653 of the Revised Statutes as amended by act of March 10, 1903, is in part as follows: "Every corporation not created under the laws of this state must, before doing business in this state, and every such corporation now doing business in this state must, within three months after the taking effect of this act, file with the county recorder of the county in this state, in which is designated its principal place of business in this state, a copy of the articles of incorporation of said corporation duly certified to by the Secretary of State of the state in which said corporation was organized, and a copy of such articles of incorporation duly certified by such county recorder, with the Secretary of State, paying to the latter the same fees as are provided by law to be paid for filing original articles of incorporation, and must within three months after the passage of this act, or from the time of commencement to do business in this state, designate some person in the county in which the principal place of business of such corporation in the state is conducted upon whom process issued by authority of or under any law of this state may be served, and within the time aforesaid must file such designation in the office of the Secretary of State, and in the office of the clerk of the district court for such county. . . . No contract or agreement made in the name of, or for the use or benefit of, such corporation prior to the making of such filing as first herein provided can be sued upon or be enforced in any court of this state by such corporation." The foregoing section also provides that any conveyance of real estate to such foreign corporation prior to the filing of its articles of incorporation and designation of agent "shall be absolutely null and void," and that all officers, agents and representatives of corporations which have failed to comply with the requirements of the

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statute shall be jointly and severally personally liable upon all contracts and agreements made in violation of the statute. It further provides that any corporation failing to comply with the provisions of the act shall not be entitled to the benefit of the statute of limitations in any suit or action prosecuted against it.

It will be seen that in the very inception of our existence as a state, the framers of the constitution provided that no foreign corporation shall do any business in this state without having first authorized a lawful agent within the state upon whom process may be served, and also having established a known place of business. This provision of the constitution is self-acting, and self-operative, to the extent that it requires the facts therein enumerated to actually exist at the time such corporation begins to transact business within the state. The constitution, however, failed to require the corporation to furnish evidence of such facts and make the same a matter of record within any designated office or offices. The legislature, nevertheless, in the exercise of its undoubted power and authority, enacted section 2653, *supra*, and thereby pointed out the specific acts and things necessary to be done by any foreign corporation in compliance with the constitutional and statutory provisions, and in order to entitle it to do business within this state. The people, in adopting section 10 of article 11 of the constitution, clearly announced and proclaimed the policy of the state toward foreign corporations, and have said in unmistakable language that such artificial beings existing only by the will of a foreign state, must subject themselves to the jurisdiction and laws of this state before they can have any recognition or legal existence within its borders. Even in the absence of any constitutional declaration on the subject, the power of the legislature to impose conditions and restrictions upon foreign corporations before allowing them to do business in the state is clearly settled and firmly established.

In 1868 Mr. Justice Field, in the leading case of *Paul v. Virginia*, 8 Wall. 181, 19 L. ed. 357, laid down the doctrine as

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follows: "The corporation, being the mere creature of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle* [13 Pet. 586, 10 L. ed. 306]: 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of these states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

It has been contended by appellant that since the statute points out certain penalties against a corporation and its agents and employees, in case it attempts to do business without complying with the statute, and since it also fails to specifically declare contracts entered into in violation of the statute to be void, that it was the intention of the legislature to only impose such restrictions and penalties, and not the intention to avoid such contracts. It will be seen that the constitution requires that a corporation shall have an authorized agent and a known place of business before transacting any business within the state. The statute says that "*before* doing business in this state" a foreign corporation *must* comply with the statute, etc. It also provides that no contract or agreement can be enforced by any corporation that has failed to comply with the statute. This language seems to us to clearly indicate both the intention of the

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framers of the constitution and of the legislature to prohibit any transaction of business until the statute has been complied with. The purpose and spirit of these provisions indicate a clear intent to make such contracts unlawful. It would hardly be consonant with the duties of the courts and the office of the judicial department of the state to uphold and enforce contracts at the instance and on the application of corporations or individuals that have transacted business in the manner and under conditions which both the framers of the constitution and the legislative department of the state have said shall be unlawful. The courts are established for the purpose of upholding and enforcing the constitution and laws of the state, and when once they have arrived at the purpose and intent of the law-making department, it is their duty to enter such judgment and decrees as will render effective that intent. The corporations that have transacted business without observing the legal requirements, and also their assignees with notice, are therefore left without a remedy for the enforcement of such contracts.

In the consideration of statutory provisions similar to the one under discussion, it is said by the authors, at section 847-b of volume 3 of Clark and Marshall on Private Corporations, that "Most of the courts hold that the object of the statute is to prohibit foreign corporations, on grounds of public policy, from doing any business in the state until they have complied with all the conditions precedent prescribed by the statute; that this prohibition is absolute, and renders illegal contracts made by a foreign corporation in the state in violation of the statute; and that, since the contract is thus illegal, the corporation cannot maintain an action to enforce the same." The authors quote at some length and with approval from the opinion of Justice Walker in *Cincinnati Mutual Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626. This is one of the leading and most numerous cited cases on the subject, and, in considering the legislative intent in the passage of an act very similar to the one here under consideration, the Illinois court says: "When the legislature prohibits an

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act, or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise would be to give the person, or corporation, or individual the same rights in enforcing prohibited contracts as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate a law, it certainly withdraws a large portion of the fear that deters men from defying the law. To do so places the person who violates the law on an equal footing with those who strictly observe its requirements. That this contract is absolutely void as to appellee, we entertain no doubt." This principle has been so repeatedly announced and affirmed by the courts as to make it impracticable, as well as unnecessary to review the authorities on the subject. We will therefore content ourselves with citing a few of the leading cases to the same effect as above: *Diamond Glue Co. v. United States Glue Co.*, 103 Fed. 838; *In re Comstock Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743; *Williams v. Scullin*, 59 Mo. App. 36; *Seamans v. Zimmerman*, 91 Iowa, 363, 59 N. W. 290; *Seamans v. Temple Co.*, 105 Mich. 400, 55 Am. St. Rep. 467, 63 N. W. 408, 48 L. R. A. 430; *Farrion v. New England Mort. Security Co.*, 88 Ala. 275, 7 South. 200, where constitutional requirement was considered; *Bank of British Columbia v. Page*, 6 Or. 431; *Thorn v. Travelers' Ins. Co.*, 80 Pa. St. 15, 21 Am. Rep. 89. On the other hand, the courts have very consistently and uniformly held that the corporation, when sued on one of these contracts, cannot interpose its failure to comply with the law as a defense, on the principle that one cannot be heard to excuse himself in a court of justice on account of his own violation of the law.

It is next urged by the appellant that if it be held that the corporation cannot maintain its action without first showing a compliance with the statute, that still he is entitled to recover

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for the reason that the legislature, by an act approved February 8, 1905, entitled: "An act relating to foreign corporations doing business in the state of Idaho," has removed the disability and relieved them of the penalties imposed by the constitution and statute. This act provides in substance that every foreign corporation doing business in the state of Idaho at the time of the passage of this latter act which had failed or neglected to file its articles of incorporation and designation of statutory agent as provided by section 2653 of the Revised Statutes, as amended by act of March 10, 1903, and which had "complied, or in good faith attempted to comply, with the constitution and laws of this state" prior to the passage of the 1905 act, should be relieved from all the penalties, forfeitures and obligations previously imposed upon it by law, and that "all acts, transactions, contracts and agreements made or entered into by such corporation, and all deeds and conveyances to it or by it shall be as valid and effectual . . . as if such corporation had duly complied with the said constitution and laws before the expiration of the time fixed and limited by section 2653." Respondent maintains that the act of February 8, 1905, is invalid and void, for the reason that it is in violation of section 10, article 11, and also section 16 of article 3 of the constitution. The reasons presented for holding this act in violation of section 10 of article 11 are, first, that it attempts to validate acts and contracts of foreign corporations that have done business in the state without having first appointed an authorized agent upon whom process might be served and established a known place of business; second, that it gives foreign corporations greater rights and privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of this state, in that it attempts to relieve them for a time after having commenced business from the burden of filing articles of incorporation, and freedom from the burden of appointing, designating and maintaining a statutory agent upon whom process can be served; and that it also attempts to relieve them for a time from the danger and liability of suits and actions

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against them within this state for breach and violation of their contracts. It must certainly be conceded that the act is unconstitutional and necessarily void if it should be held that it attempts in any manner to relieve foreign corporations of any of the duties, obligations or liabilities imposed upon them by the constitution, or extends to them any privileges not enjoyed by similar domestic corporations. It would seem from the most casual reading of this act that it attempts to do those things. It is unnecessary, however, for us to further consider this contention, for the reason that the act is clearly in violation of section 16, article 3 of the constitution which provides: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." The sole and only purpose of the act was to relieve foreign corporations of the pains, penalties and forfeitures incurred by them in the transaction of business within this state in violation of both the constitution and statute. It was intended, as stated in the body of the act, to validate all conveyances of real estate to which they had been parties; to enable them to sue upon their contracts; to enable them to plead the statute of limitations; and to place them upon the same footing as they would have been had they complied with the organic law and the statutes of the state. The title, "An act relating to foreign corporations doing business in the state of Idaho," would never suggest to the most imaginative reader that it is the index to an act which has for its sole and only purpose the relief of foreign corporations, from the penalties and liabilities incurred by reason of their violating the law. The purpose of the title is to indicate to the lawmaker and the citizen as well the character and subject matter of the legislation proposed by the act. (*Turner v. Coffin*, 9 Idaho, 338, 74 Pac. 962; *State v. Jones*, 9 Idaho, 693, 75 Pac. 819.) The title under consideration would scarcely afford any suggestion or intimation of the enactment it conceals. Again, this act is outside of the ordinary and usual scope of legislation. It is a retrospective law; its object is to remove burdens and obligations already incurred, and this makes it the more necessary

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and important that such an act have an appropriate title sufficient to give notice of its contents and bring it within the constitutional requirement.

The supreme court of Alabama, in *Lindsay v. United States Sav. etc. Co.*, 120 Ala. 126, 24 South. 171, 42 L. R. A. 783, recently had occasion to consider the sufficiency of the title to a legislative act which had for its purpose the legalization of past transactions, and the court there entered into a discussion of the subject at considerable length and with much reason. The court says: "The future, and not the past, is the ordinary usual field and scope of legislation. . . . Prospective laws—laws looking to and operating in the future—are the rule; retrospective laws, looking backward, are exceptions. (Wade on Retroactive Laws, sec. 1.) Because the future, not the past, is the usual field and scope of operation, comes the general rule that, by construction, retroactive or retrospective operation will not be given a statute, unless its terms show clearly the legislative intention that it should have such operation. . . . And there may be 'curative,' or, as they are sometimes termed 'healing,' statutes, the subject being expressed in general terms, and may satisfy the requirement of the constitution. But when it is proposed by an act like the present to deal with existing contracts and liabilities, there should be in the title some expression of that intention—some indication that such is the intent, or the purposes of the constitutional requirement are not satisfied." To the same effect is *Snell v. Chicago*, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; *Lockport v. Gaylord*, 61 Ill. 276; *Brieswick v. Mayor of Brunswick*, 51 Ga. 639, 21 Am. Rep. 240.

The next contention with which we are met is that since the act of March 18, 1901, establishing the office of insurance commissioner, and providing for the regulation and licensing of insurance companies, imposes substantially the same requirements and restrictions on insurance companies as section 2653, *supra*, enjoins on foreign corporations in general, it was unnecessary for an insurance company to comply with section 2653, and was not the intention of the legislature that it should do so. We do not think we are either required to consider, or

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would be justified in passing on, this question in the condition the case comes before us. If the plaintiff intended in the lower court to excuse and justify the company's failure and neglect to comply with the act of March 10, 1903, on the grounds that it had complied with the act of March 18, 1901, it was plaintiff's duty, when the question was raised, to have made the showing that the company had in fact complied with the latter act, and thereby established the company's legal standing within this state, and its right to recognition and consideration by the courts of this jurisdiction. (*Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 594, 22 S. W. 743.) Having failed to do so, and the record being entirely silent as to whether or not the Mutual Life Insurance Company has ever complied with the insurance laws of 1901, and it affirmatively appearing that it failed to comply with the act of March 10, 1903, this court is not placed in possession of sufficient evidence to justify it in considering as to whether or not a compliance with the insurance law alone would entitle such companies to transact business within this state.

Lastly, the appellant, Mr. Katz, is not an innocent purchaser for value. He was in charge and control of the Mutual Life Insurance Company's business in this state, and had notice of the consideration for which the note was executed, and is presumed to have known of the company's failure and neglect to comply with the law in filing a copy of its articles and designation of an agent on whom service of process might be had. Plaintiff occupies no more favorable position in the case than the insurance company would hold if suing on this contract. On this point Clark and Marshall on Private Corporations, volume 3, section 847h, say: "By the weight of authority, if a negotiable note or bond is given to a foreign corporation in a transaction which is illegal because of the corporation's failure to comply with the conditions precedent to the right to do business prescribed by statute, the illegality may be set up as against a holder of the note or bond who has not paid value, or who purchased with notice, but not as against a *bona fide* purchaser for value without notice."

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It follows from what has been said that the judgment of the lower court must be affirmed, and it is so ordered. Costs awarded to respondent.

Stockslager, C. J., and Sullivan, J., concur.

ON REHEARING.

(September 6, 1906.)

AILSHIE, J.—This case was heard and decided at the November, 1905, term of this court, and a petition for rehearing was thereafter filed by counsel for appellant. A petition for rehearing was also filed by Messrs. W. E. Borah, James E. Babb and John P. Gray as *amici curiae*, after having secured permission so to do from a majority of the justices. After an examination of the petitions a rehearing was ordered. The cause was again argued and submitted at this present term of court. We have been furnished with briefs by the attorneys of the respective parties to the action, and in addition thereto we are favored with an elaborate and exhaustive brief, both by way of argument and citation of authorities, signed by Messrs. W. E. Borah, James E. Babb, John P. Gray and Stiles W. Burr, and also a brief by Messrs. W. B. Heyburn and John P. Gray, as *amici curiae*, urging a reversal of our former judgment, and insisting that the same is erroneous, and that we have misconstrued the provisions of our constitution and statute. We are also furnished with a brief by Messrs. M. A. Folsom and J. E. Blair, as *amici curiae*, reviewing the authorities, and presenting an argument in support of the original opinion as filed by the court. Counsel, in opposition to the views originally announced by the court, submit two principal and leading propositions: First, that section 10 of article 11 of the constitution is not mandatory and self-operative, and that it does not provide any penalty for its violation; second, that the act of February 8, 1905, entitled "An act relating to foreign corporations doing business in the state of Idaho," was properly

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and sufficiently entitled and that the same is constitutional and valid.

Upon the first point urged there has been presented a great array of authorities. Our examination of the decisions and constitutions of various states discloses that a number of the states, notably western states, have constitutional provisions very similar to, and in many instances identical with, section 10, article 11 of the Idaho constitution. Upon the contention that this provision of the constitution is not self-operative and self-executing, the authorities are almost uniformly against the contention made. It is quite uniformly held that all negative or prohibitory clauses in mandatory or prohibitive form are of themselves self-operative as to the subject matter or thing to be prohibited or denied. (*Law v. People*, 87 Ill. 385; *Davis v. Burke*, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210. See 6 Am. & Eng. Ency. of Law, 2d. ed., 913; *Oakland Paving Co. v. Hilton*, 69 Cal. 483, 11 Pac. 3.)

As to the contention made by counsel that this constitutional provision carries with it no penalty and affords no defense to an action, and that it is only available to the state in an action of ouster against noncomplying foreign corporations, we are unable to agree with the argument advanced. It is true that many authorities, while not discussing the direct effect of such a constitutional provision, upon the whole support counsel's contention. It is noteworthy, however, that the authorities that attempt to deal with the general principle involved are in irreconcilable conflict both as to the reasons advanced for their holding and as to the conclusions reached therefrom. In the language of Justice Kellam in *Wright v. Lee*, 4 S. Dak. 237, 55 N. W. 933, "the conclusions of the courts are not only irreconcilable with each other, but no general controlling principle can be deduced from the judgments or the reasoning of the cases." Some courts have held that contracts made in violation of such constitutional or statutory provisions are wholly void; others have held them voidable only, while still others hold that such provisions have no effect upon, and no application to, contracts

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made by noncomplying foreign corporations, and that the only effect of such provisions is to give the state the power to oust the disobedient corporation. The reasoning of the courts is neither conclusive nor assuring, especially when we consider their utter lack of harmony touching the reasons given for holding that such provisions amount to practically nothing in so far as the protection of the citizen is concerned. *Utley v. Clark-Gardner L. M. Co.*, 4 Colo. 372, is an example of the strange reasoning employed in some of these cases. There it was held that a constitutional provision identical with our own was a prohibition against doing business before complying with the terms of the law, but that to sue on such a contract was not *doing business*, and that therefore the constitution did not prohibit maintaining an action for recovery on the prohibited contract. This kind of reasoning is too delicately veiled and highly technical to appeal to us with much force. We take it that when the framers of the constitution said that "no foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent," etc., and the people adopted it into their organic law, that they meant exactly what the clear and unmistakable language employed implies. We cannot understand how such language can require construction or interpretation. It carries with it, on its face, its own construction and meaning. Neither can we agree with the contention made that such a provision is only meant for the protection of the state itself in its sovereignty. Now, it is clear to our minds that it was adopted for the protection of the citizen. A foreign corporation permitted to do business in this state does not obtain its franchise or legal existence from the laws of this state, but from the laws of the foreign state in which it was created. It obtains recognition and the right to do business here, not through and by reason of becoming incorporated under the laws of this state, but by reason of the performance of certain acts within this state in its corporate name and by its corporate authority. A failure to comply with these requirements and obtain the legal right to transact business is not in fact so much of an invasion

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or violation of the sovereignty of the state as it is a violation of the private and property rights of the citizens with whom it does business. At the time of the adoption of the constitution, as well as now, it was the practice of many tramp, predatory and rapacious foreign corporations organized under the laws of—nobody knew where—to come into this jurisdiction and, without appointing an agent or establishing a place of business, make contracts and transact business, and after having violated their contracts or committed injuries and depredations upon the rights of the citizen, avoid the process of the state courts—which practically amounted, in many instances, to complete protection and immunity from the consequences of their unlawful acts. In the great majority of instances, if the citizen be unable to prosecute his action and secure redress for his grievances in the state courts and in the county where he resides, it amounts to denying him redress at all. In other words, to be dragged two or three hundred miles to prosecute his action in the federal court, amounts to denying him justice at all. These and other like reasons were undoubtedly the moving considerations for the framers of the constitution, and the people in its adoption, incorporating such a provision into that instrument. In view of these facts, for the courts to turn round and hold that no one but the state can invoke the provisions of that constitutional inhibition would be an utter perversion of justice and the plain intent of the people. A citizen has a right to presume that any foreign corporation that offers to enter into contracts and do business with him has complied with the law, and has a right to do business in the state, and has subjected itself to the state's jurisdiction, and we know of no principle either of law or justice that would put him under the necessity of examining the records of the Secretary of State and the county auditor of his county every time a foreign corporation offers to transact business with him. If he has a right to assume that such corporations have complied with the law, then he must undoubtedly and of necessity have the right to invoke the provisions of the constitution and statute against the recalcitrant and offending corporation that has not, in fact, sub-

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jected itself to the jurisdiction of the state whenever it seeks to prosecute an action against him founded upon a right accruing during the time he would have been unable to procure service of process upon such corporation. And the fact that the corporation has kept its contract, although failed to comply with the law, so long as the transaction is not closed on both sides, does not alter the reason for the requirement, nor retroactively give the other contracting party means of serving process had he so desired or had the exigency arisen.

A great deal is said in the briefs of counsel, as well as in some of the authorities cited, about the evil the courts encourage in upholding a citizen of the state in dishonest transactions by allowing him to interpose this defense. That sounds very reasonable and is quite persuasive, but these authorities in this line of reasoning seem to lose sight of the honesty and morality—or, rather, lack thereof—involved on the other side of the question when corporations come into the state and decline to comply with its laws and subject themselves to the service of its process for the depredations and transgressions they commit while thus doing business in violation of its laws. We fail to see any greater evil in allowing a citizen to interpose as a defense the fact that a foreign corporation has failed to comply with the constitution and statute in appointing an agent and establishing a known place of business than there is in allowing such companies to come into the state and prey upon its citizens in total disregard of the law and say that such contracts are binding and enforceable. We have never held, and never intended so to do, that such contracts are entirely and absolutely void. On the contrary, we intimated in the original opinion that they are enforceable on the side of the party with whom they have assumed to contract. We did say, however, that the corporation should be without any remedy in the courts on an action to enforce contracts made by them while in default of compliance with the requirements of law. The evil does not exist so much in the contract as in the legal existence of one of the contracting parties. They are in some respects in the same position as a *de facto* domestic corporation that has failed or neglected

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to become a *de jure* corporation. They come into the state, transact business in some capacity, but refuse to comply with the laws of the state that gives them a standing within its jurisdiction as corporations. They do business, therefore, without name, identity or legal existence.

Much is said as to the evil effects to flow from such holding, but we are satisfied from our examination of the question that the greater number of these evils are imaginary and chimerical rather than real. We hold the citizen liable criminally even though he did not know the law he has violated, and we know of no valid reason why a corporation should not be equally chargeable with knowledge of the law and its requirements. Courts of equity are always able to protect innocent and honest persons in legitimate transactions, and we are satisfied that the courts of this state can and will protect all persons who have had honest dealings with noncomplying foreign corporations where they deserve protection. The best way, however, to secure a compliance with and obedience to the laws is to begin at the fountainhead and enforce its obedience on all alike. These corporations can always get service on the citizen; but where they fail to comply with the law, he can seldom get service on them. Indeed, he can seldom find where they live, from whence they came or whither they have gone.

Counsel lay much stress on *Fritz v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93. A careful perusal of that case discloses that it is not in point here. That was an action in ejectment to recover possession of certain real estate. Plaintiff's grantor had previously conveyed the property to a foreign corporation that had not complied with the laws of the state of Colorado prior to its commencement to do business in the state. The court said: "It may be assumed, therefore, that the Comstock Mining Company, being a corporation of another state, had no right to do business in the state of Colorado until after it had one or more known places of business within its limits, and an authorized agent designated upon whom process could be served, nor until it had made and filed in the proper office the certificate prescribed by

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section 260 of the statute relating to foreign corporations. . . . But it does not follow that the title to the property conveyed to the Comstock Mining Company remained in Groshon, notwithstanding his conveyance of it to that company, in due form, and for a valuable consideration."

The Fritz-Palmer decision did not arise from an action to enforce a contract, but from a suit to cancel and avoid a contract; the holding that incompetency of the corporation to take and hold title to real estate could only be invoked by the state was a sound, equitable principle peculiarly applicable to that class of cases, but has no application here. There no right had been jeopardized, no risk had been incurred by the party pleading the noncompliance of the adversary; here the hazard and risk is admitted—hazard and risk of being unable to get service of process on the noncomplying corporation. The right to take and hold title to real property is one that can neither legally nor equitably concern the vendor thereof after he has parted with his title and received the purchase price therefor.

Counsel furnish an exhaustive argument and cite a great number of authorities in support of their position that the title to the act of February 8, 1905, is a sufficient compliance with section 16 of article 3 of the constitution. The citations are entirely too numerous for us to undertake to analyze them; besides, they are all on such different subjects of legislation and concern such a variety and diversity of topics of legislation, and the facts and circumstances under which they were enacted and considered by the courts so at variance with the case at bar, that a review and analysis of them would be of no special value in this opinion. A great many of the cases cited in support of the title to the act under consideration were cases where the legislature had amended municipal charters or charters of public or governmental institutions, wherein the various legislatures have ratified and confirmed some municipal or public act in which the rights of private individuals were not abridged or affected, and where the public only were interested and concerned. We do not conceive that that line of cases are authority in determining the suffi-

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ciency of the title to an act like the one under consideration. It is argued in this case that the title of the act covers the subject of the legislation, and that it was sufficiently general and comprehensive to include the subject concerning which the act attempted to legislate. The main trouble with this title is that it is misleading, and does not furnish notice as to the subject matter about which it attempts to legislate. There is a vast difference between a general and comprehensive title that covers a general subject about which it is attempted to legislate, and which will, of course, embrace all incidental and ancillary matter proper or necessary to perfect the legislation and make it operative in all its parts, and a title referring to a general subject where the legislation does not touch that subject, but is merely and solely an incident of the subject. In this case the title gives notice that the legislation proposed concerns "foreign corporations doing business in the state of Idaho," but when we come to examine the actual legislation, we find that it has no reference to business that foreign corporations are either doing *in praesenti* or intending to do *in futuro*, nor does it even affect all foreign corporations. Its sole business is to cure and validate business transactions already consummated of that class of foreign corporations that have previously disregarded the constitution and the statutes of the state. Its object is to remove a disability from a class of foreign corporations that have transacted business under conditions and a state of facts that the constitution and statutes say they should not. We might say with equal propriety here, as we said in *Turner v. Coffin*, 9 Idaho, 338, 74 Pac. 962, that: "The trouble with this act is that the title and the act do not fit each other. The title indicates one thing while the bill attempts to write an entirely different thing into the law." It is true that none of the authorities, so far as we know, have held that the title should consist of an *index* in the sense that it should enumerate item after item upon which it is intended to legislate; but it should be an index in the sense that it should point out in a general way the scope and object of the proposed legislation.

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It has been asserted by counsel that *Lockport v. Gaylord*, cited in the original opinion, has been expressly repudiated by the supreme court of the United States in *Mohomet v. Quackenbush*, 117 U. S. 508, 29 L. ed. 982, 6 Sup. Ct. Rep. 858. Our examination of the latter authority fails to satisfy us that the United States supreme court has meant to disapprove the doctrine there announced. On the contrary, that case is referred to and cited as authority by the Illinois supreme court as late as 1890, in *Snell v. Chicago*, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858. In the latter case the court says: "It must also be held, upon the authority of *Lockport v. Gaylord*, 61 Ill. 276, that section 3 of the act of March 1, 1854, is unconstitutional. The title of the last-named act is 'An act to incorporate the Northwestern Plank Road Company.' Section 3 thereof, after reciting that the corporators had theretofore organized, and proceeded to prosecute the construction of the road under the void act of February 12, 1849, attempts to legalize and make valid the acts done in pursuance of such void act. The legalization of unauthorized acts cannot be regarded as germane to the subject expressed in the title."

Counsel also assert that *Brieswick v. Brunswick*, cited by this court, was overruled in *Hope v. City of Gainesville*, 72 Ga. 246, and *Bonner v. Milledgeville Ry. Co.*, 123 Ga. 973, 50 S. E. 973. An examination of these latter authorities entirely fails to justify the assertion made as to their effect upon the former authority. The principal case in which the Georgia court held that its former decisions contained *obiter*, and in which it distinguished, was *Gardner v. Georgia R. & B. Co.*, 117 Ga. 534, 43 S. E. 863, but the point on which the court was distinguishing was an entirely different proposition from that involved here, and did not involve the Brieswick-Brunswick case. Indeed, the latter case is not mentioned or cited in the Gardner case.

The elaborate, exhaustive and able briefs with which we have been favored have seemed to demand more than ordinary consideration and examination of the authorities and questions touched, and we have accordingly devoted to them much

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time and labor. We have contented ourselves, however, in this opinion with only a statement of some of the principal and controlling considerations which have led us to the conclusion at which we have arrived, without any attempt at the interminable task of analyzing, discussing or reviewing the enormous mass of authorities to which we have been directed and which we have examined with diligence.

We conclude that the judgment of the court as previously announced must stand as the unanimous conclusion and judgment of the court, and it is so ordered.

Stockslager, C. J., and Sullivan, J., concur.

(February 10, 1906.)

ADIN M. HALL et al., Appellants, v. J. W. NIEUKIRK et al., Respondents.

[85 Pac. 485.]

APPOINTMENT OF A RECEIVER—ALLEGATIONS OF THE COMPLAINT—WHEN RECEIVER WILL BE APPOINTED.

1. Upon a proper showing a receiver will be appointed for a corporation *pendente lite*.

2. Under the provisions of subdivisions 5 and 6 of section 4329 of the Revised Statutes, a receiver will be appointed where it is shown that the corporation is insolvent or in imminent danger of insolvency, and in all cases where receivers have heretofore been appointed by the usages of the courts of equity.

3. Under the allegations of the complaint, *held* that the court erred in refusing to appoint a receiver.

4. Under our statute an appointment of a receiver does not necessarily cause a dissolution of the corporation, unless the court so directs; the receiver may be appointed simply to manage the affairs of the company during the pendency of the litigation.

5. Upon the application of a stockholder where it is shown that the directors and officers of the corporation are mismanaging its affairs for their own personal advantage and gain, and where it is shown that the profits of the business of the corporation are being absorbed by such mismanagement in paying the salaries of favorite

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employees, whose services are not necessary to the proper conduct of the business of the corporation, and where gross mismanagement is shown, which if continued would necessarily result in insolvency of the corporation, a receiver should be appointed.

(Syllabus by the court.)

APPEAL from the District Court of Fourth Judicial District for Elmore County. Hon. Lyttleton Price, Judge.

Application for the appointment of a receiver, which was denied by the trial judge. *Reversed.*

E. M. Wolfe and E. J. Dockery, for Appellants.

“A receiver of a corporation upon proper application by a proper party, may be appointed, when upon application of a stockholder it is shown that the directors and officers of the corporation are mismanaging its affairs, as for their own personal advantage and gain.” (Smith on Receivership, p. 395, sec. 225, subd. c; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, 26 N. W. 184; *Supreme Lodge Co. O. of I. H. v. Baker*, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210; *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487.) “When the majority stockholders are clearly violating the chartered rights of the minority and putting their interests in imminent danger,” a receiver will be appointed by a court of equity. (Smith on Receivership, p. 362, sec. 225, subd. j; *State v. Second Judicial District Court*, 15 Mont. 324, 48 Am. St. Rep. 682, 39 Pac. 316, 27 L. R. A. 392.)

Minority stockholders may secure the appointment of a receiver pending investigation of gross fraud by the majority stockholders. (*State v. Second Judicial District Court*, 15 Mont. 324, 48 Am. St. Rep. 682, 39 Pac. 316, 27 L. R. A. 392.)

When the conduct of the officers of a corporation is satisfactorily established as fraudulent it is not only proper, but it is the duty of the court to wrest from such officers the management of the company and place the company in charge of a receiver. (Smith on Receivership, p. 369, sec. 228, note 2;

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Nichols v. Perry Pat. Arm. Co., 11 N. J. Eq. 126; *Attorney General v. Bank of Columbia*, 1 Paige, 511.)

Fraud and collusion on the part of the officers and directors of a corporation which may result in danger of the loss of the property of such corporation constitute sufficient grounds for interference of a court of equity and the appointment of a receiver over its property and business. (Smith on Receivership, p. 366, sec. 227; *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, 26 N. W. 184; *Hedges v. Paquett*, 3 Or. 77; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530.)

If possession of defendants is obtained by fraud, or that the income is in danger of loss from neglect, waste or misconduct justifies appointment. (*Gilbert v. Block*, 51 Ill. App. 516.) Mismanagement, diversion of funds, applying assets to benefit of officers are grounds for receiver. (*In re Lewis*, 52 Kan. 660, 35 Pac. 287.) "When the business of a corporation is mismanaged and its property misappropriated by its officers, and such mismanagement is likely to continue, courts of equity will appoint a receiver for it." (*Stevens v. South Ogden Land etc. Co.*, 14 Utah, 232, 47 Pac. 81.)

Conspiracy of officers to dissipate corporate funds and to fraudulently absorb and apply its assets to the individual benefit of such officers are grounds for appointment of receiver. (*In re Lewis*, 52 Kan. 660, 35 Pac. 287.) There may be very exceptional circumstances under which a court of equity may appoint a receiver and wind up a corporation at the suit of a stockholder, even in the absence of a statute. (2 Clark & Marshall on Corporations, p. 1713, sec. 556; *Sternberg v. Wolf*, 56 N. J. Eq. 389, 67 Am. St. Rep. 494, 39 Atl. 397, 39 L. R. A. 762; *Dickerson v. Cass County Bk.*, 95 Iowa, 392, 64 N. W. 395; *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 63 Am. St. Rep. 389, 70 N. W. 216, 38 L. R. A. 122; *Miner v. Belle Isle Ice Co.*, *supra*; *Supreme Sitting O. I. H. v. Baker*, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210, and innumerable other cases.) *Haywood v. Lincoln Lumber Co. et al.*, 64 Wis. 639, 26 N. W. 184, holds squarely that receiver may be ap-

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pointed when company is being mismanaged and assets in danger of being lost to stockholders. *Miner v. Bell Ice Co.*, *supra*, holds when fraud, abuse of trust or misappropriation of corporate funds, at the instance of a single stockholder a court of equity will appoint a receiver. Likewise *Supreme Sitting Order of Iron Hall v. Baker*, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210; Smith on Receivership, p. 382, sec. 233, 385, subd. e; *Brandt v. Allen*, 76 Iowa, 50, 40 N. W. 82, 1 L. R. A. 653.

W. C. Howie, for Respondents.

Practically all the decisions, Idaho included, are to the effect that receivers will not be appointed except in those cases expressly authorized by statute. Courts, before judgment, can appoint receivers only in those cases mentioned in section 4329, and then only in particular cases. (*Sweeny v. Mayhew*, 6 Idaho, 455, 56 Pac. 85, and see the numerous cases hereinafter cited.)

Where a receiver *pendente lite* is sought, it must be conclusively shown that there is great danger that the property will be lost by the delay till the cause can be tried. In sustaining the above principles see the following, among other authorities: High on Receivers, sec. 288; *Coquard v. National Linseed Oil Co.*, 171 Ill. 480, 49 N. E. 563; *People v. Weighley*, 155 Ill. 491, 40 N. E. 300; *People v. District Court*, 33 Colo. 293, 80 Pac. 908; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *French Bank Case*, 53 Cal. 495; *Smith v. Superior Court*, 97 Cal. 348, 32 Pac. 322; *State Investment Ins. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549; *Fischer v. Superior Court*, 110 Cal. 129, 42 Pac. 561; *Jones v. Bank of Leadville*, 10 Colo. 464, 17 Pac. 272; *Mason v. Supreme Court of Equitable League*, 77 Md. 483, 39 Am. St. Rep. 433, 27 Atl. 171; *Espuela Land etc. Co. v. Bindle*, 5 Tex. Civ. App. 18, 23 S. W. 819; *State v. Murphy*, 118 Mo. 7, 25 S. W. 95.

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The necessity to bring suit to recover property of the corporation is no ground, as the stockholders themselves can sue as well as a receiver. (*Hallenborg v. Cobre Grande Copper Co.* (Ariz.), 74 Pac. 1052.)

The court has no power to appoint a receiver, except upon express statutory authority, because of internal dissension or bickerings. (*Republican etc. Mines Co. v. Brown*, 58 Fed. 645, 7 C. C. A. 412, 24 L. R. A. 776.) A court of equity has no power to remove the officers of a corporation, unless expressly given it by statute. Many states have conferred that power on them, hence the decisions to that effect, but ours has not. (3 Clark & Marshall on Corporations, pp. 2039 (4), 2044-2048; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.)

SULLIVAN, J.—This is an appeal from an order of the judge of the fourth judicial district court denying the application of the appellants for the appointment of a receiver for the Charles R. Kelsey Company, Limited, a corporation organized under the laws of the state of Idaho, and doing a general merchandising business in Elmore county. The application was based on the amended complaint in the action. All of the allegations of that complaint were admitted by the respondents, as they did not by answer or otherwise deny any of them at the time said application for a receiver was presented and passed upon by the judge. Among many of the allegations of the complaint we find the following: That Charles R. Kelsey, on or about February 1, 1901, owned and operated a general merchandise store in Mountainhome, said county, and that on or about said day was organized the defendant corporation; that the appellants were inexperienced in the merchandising business and that said Kelsey represented to them that his merchandising house was doing a prosperous business and that the new corporation would make large profits, and guaranteed to the plaintiffs or to the appellants, and to all owners of preferred stock an annual dividend of ten per cent, and to that end he caused the stock of said corpora-

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tion to be issued in preferred and common, \$25,000 of each. All of the preferred stock he sold to plaintiffs and others, who paid cash therefor; that plaintiffs were led to believe that said preferred stock would receive a ten per cent dividend which would be paid semi-annually, but as a matter of fact said articles of incorporation guaranteed said dividends only out of the profits of the business before the common stock should share in any part thereof; that only three semi-annual dividends had been paid and that no dividends whatever had been paid on said preferred stock since August, 1902; that in fixing the value of the store and general assets of said Kelsey which went to make up the property transferred to said corporation, there was considered and valued a large number and amount of open accounts to said Kelsey, and he guaranteed said accounts should be paid within one year after the incorporation of the said company, and as security for such guaranty it was agreed that \$15,000 of the common stock should remain and be the property of the corporation and should not be delivered to said Kelsey or to any other person until all of said open accounts should be paid to said corporation; that thereafter a considerable part of said accounts were paid, and by proper resolution of the board of directors of said corporation, the president and secretary were directed to issue to said Kelsey \$10,000 worth of the common stock and to retain as the property of the company the remaining \$5,000 worth of common stock; that at that time said Kelsey was president of the company, and instead of issuing \$10,000 as directed, he caused to be issued \$5,000 additional of the said common stock, thus defrauding the plaintiffs out of said common stock; that there is yet due and unpaid a large amount upon said open accounts so guaranteed by Kelsey; that thereafter said Kelsey transferred said \$5,000 worth of common stock so fraudulently issued to him to his wife Altha B., who took the same with full knowledge that said stock was fraudulently issued; that on or about the twenty-fourth day of June, 1904, said Kelsey died, and that on or about the ninth day of July, 1904, the defendant, J. W. Nieukirk, was elected president of the said

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company to succeed the deceased; that he was elected in opposition to the votes of the plaintiffs who were members of the board of directors; that said Nieukirk is a practicing physician and is wholly unacquainted with the mercantile business; that he was a particular friend of the said Kelsey, deceased, and his wife, and was their family physician, and that he always sustained them at the meetings of the stockholders and of the directors of said corporation; that among the duties of the secretary and treasurer is that of preparing every month for the regular monthly meeting of the board of directors a statement in writing showing the present financial condition of the company, the business transacted during the preceding month, the cash taken in and paid out and the amount due and owing to the company; that said Nieukirk has refused to allow the secretary and treasurer to prepare and present to said board the said monthly reports, although the same has often been requested by the board of directors; that on the seventeenth day of November, 1904, the directors, believing that it was for the best interest of the company and stockholders, ordered and directed an inventory of the property of said company to be taken so that they might know how the company stood financially, and for that purpose they employed one Wilterding, an experienced merchant, whereupon defendant Nieukirk then and there refused to allow him or any person to make an appraisal of the company's property; that said Nieukirk, Altha B. and Altha R. Kelsey and George C. Nichols have conspired together for the purpose of defrauding said corporation and the plaintiffs herein and other stockholders, and in furtherance of said conspiracy and fraud said Nieukirk has refused to preside over the regular monthly meetings of the board of directors, although personally present; that he failed to entertain motions made for the purpose of adjourning such meetings; that he has left meetings of the board for the purpose of reducing the number so that there would be no quorum present, thereby forcing an adjournment; that at various meetings of said board he has become very offensive, abusive and insulting to the mem-

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bers of the board; that he is at enmity with every member of the board, except the two Kelseys and Nichols; that on the seventeenth day of December, 1904, while the board of directors was in session in the company's store building, they requested their counsel to appear before them, for the purpose of counseling and advising them, whereupon said Nieukirk refused to allow said counsel to enter the building, declaring that he would put him out by force and violence if he attempted to enter; that he refused to abide by their instructions or to carry out their orders; that he manages and operates the business of the said company in the interest of himself and of the said Kelsey's family to the exclusion of the other stockholders; that he draws from the funds of said company the sum of \$150 per month for his said services, which instead of being a benefit are an injury to the company because of his inexperience and misconduct; that he employs the Kelsey family in said store; that the office help alone consists of four persons at a monthly cost of \$500; that in the sales department he employs four persons at a monthly salary of \$450; that in the delivery department he employs a man and a boy at a monthly cost of \$100; that the work of the office, including the superintending of the buying, can be done by two persons at a cost not to exceed \$175 monthly, and that for the five months next preceding the election of said Nieukirk as president, the office force consisted of two persons for three months at a salary of \$150; and for two months at a salary of \$185; that the total cost of help for said company should not exceed \$550; that the board of directors have often directed that the purchases of the company should be made on a cash basis. Notwithstanding the repeated orders of the board to that effect, at the close of the year ending January 31, 1904, the said Kelsey, deceased, had so managed the company's business that it was indebted to wholesale houses and firms in the sum of \$16,000, all of which was overdue; that said Kelsey and Nieukirk urged the board of directors to consolidate the indebtedness of the company and place it with one bank or person and that the time for payment thereof

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be extended; that in so doing the finances of the company would be in such condition that all purchases thereafter could be made for cash and all bills discounted, thereby making a great saving to the company. Relying upon such representations the appellants joined with the defendants in an order directing said Kelsey to secure a loan of \$16,000; that thereafter said Kelsey became ill and unable to attend to said matter, and that said Nieukirk and others negotiated a loan of \$16,000, which loan was secured by mortgage on the company's property; that said loan was to be paid monthly in payments of \$1,000; that four of said monthly payments only had been made; that all other of said monthly payments are now past due and remain unpaid; that said Nieukirk instead of conducting said business upon a cash basis in the purchase of goods, has so managed and conducted the business that said company now owes \$11,000 for goods purchased which amount is overdue; that said Nieukirk and Altha B. Kelsey, in furtherance of the conspiracy, transferred to Altha R. Kelsey, daughter of Altha B., without consideration, a number of the shares of the capital stock of said company, and so transferred to the said George Nichols five shares of the capital stock thereof; that said transfers were made for the sole and only purpose of enabling said Kelsey and Nichols to become directors of said company that they might assist Nieukirk and Altha B. Kelsey in said conspiracy; that at the annual meeting of the stockholders on the 16th of January, 1905, the plaintiffs and Altha B. Kelsey were elected directors of said company, but that said Nieukirk, Altha B. and Altha R. Kelsey and Nichols, in furtherance of said conspiracy and after said election and without further ballots being taken, during a recess of said meeting and in pursuance of said conspiracy, did fraudulently and unlawfully remove four of the ballots which had been cast prior to said recess, and in their place substituted other ballots and that said ballots were counted by said defendants on the accumulated plan; that by reason of said fraudulent change of said ballots the defendants, Nieukirk, Kelseys and Nichols were de-

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clared elected as directors of said company in fraud of said company and of the rights of plaintiffs. That after said fraudulent election the four persons mentioned elected said Nieukirk president, Altha B. Kelsey vice-president and George C. Nichols, secretary and treasurer of said corporation; that no meeting of the board of directors has been held since the annual meeting of January, 1905; that no monthly statement of the financial condition of the company has been rendered since said annual meeting, and none was made at that time and that said defendants had refused to make such report, in violation of the by-laws of the company. That Nieukirk had taken from said company the sum of \$1,800 for one year's service as president of the company; that said fraudulently elected officers have conspired together to defraud the appellants and other stockholders of any and all profits of said business, and have fraudulently denied the plaintiffs and other stockholders from all knowledge or participation in the conduct of such business; that in furtherance of such conspiracy said defendants have paid to themselves and their favorites salaries way beyond the value of the services rendered by them to the said company, in order to consume the profits and substance of the said company; that while the business of the said company now and for several months last past is less than one-third of the business done by said company before the incompetent management of Nieukirk and the other defendants, they have continued to employ an unnecessary force to conduct the business of said company, and have increased the salaries of the said Kelseys and Nichols, and that the affairs of the company have been so recklessly, fraudulently and incompetently managed that the salary expense thereof ranges from \$722 to \$959 per month, and that the total expense of conducting the business is from \$1,100 to \$1,500 per month, and that the average monthly sales do not exceed \$5,000 per month; that to give the impression of doing a large business, credit is indiscriminately extended to people of little or no financial responsibility, and accounts of long standing are left uncollected so that about two-thirds of the total out-

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standing bills of said company, aggregating upward of \$20,000 are uncollectible and that said misconduct, mismanagement and extravagance in the affairs of said company are deliberately and intentionally made on the part of said Nieukirk, and in furtherance of a purpose and conspiracy to divert the funds and apply the assets to their own benefit, whereby plaintiffs are defrauded, and the said company is in imminent danger of becoming insolvent if it is not in fact already so; that said \$5,000 of common stock was to become the property of the stockholders in the event Kelsey failed to collect or pay outstanding accounts, aggregating over \$2,300, and that said stock was fraudulently issued by said Kelsey and assigned to the defendant Altha B. Kelsey, and that said accounts have not been collected and have been fraudulently charged to the account of said C. R. Kelsey months after his death, and that the same were uncollectible from his estate and that said accounts were so charged for the purpose of consummating the conspiracy to defraud plaintiffs and said stockholders of the \$5,000 worth of common stock; that on October 31, 1904, said Altha B. Kelsey owed said company the sum of \$758.14 on account, and had the same transferred to the account of C. R. Kelsey, deceased; that said transfer was caused to be made by the said Nieukirk, Kelseys and Nichols with the full knowledge that said C. R. Kelsey was dead and had left no estate, and that said account was utterly worthless as an account against his said estate; that said transfer was made expressly for defrauding plaintiffs and other stockholders out of said sum of \$758.14; that said Altha B. Kelsey now disclaims said debt and obligation and refuses to pay the same; that no redress can be obtained by plaintiffs in an action in the name of the corporation, as its officers and directors are parties to and direct beneficiaries of the fraud practiced upon plaintiffs, and they neglect and refuse to require said Altha B. Kelsey to pay said sum or any part thereof or to require her to assign and transfer to the company said \$5,000 worth of common stock so fraudulently acquired by her; that prior to the organization of the said cor-

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poration as an inducement and protection to the owners and holders of the said preferred stock, it was understood and agreed by and between them and all owners of stock that the holders of preferred stock should have the privilege, power and authority to elect the secretary and treasurer and to fix his salary, and to that end a by-law was adopted as follows: "The office of secretary and the office of treasurer may be held by the same person, both offices to be filled and the salary fixed by a majority vote of the preferred stockholders at the time of the stockholders' annual meeting. He or they shall hold the office for one year. In case of a vacancy by resignation, disqualification or removal, the vacancy is to be filled in the same manner as the election."

That at the annual meeting of the stockholders in January, 1905, Nieukirk, Kelseys and Nichols, representing all the common stock and a very small minority of the preferred stock, against the will and without the authority or consent of the holders of the majority of the preferred stock, in furtherance of said conspiracy and in fraud of plaintiffs, so amended said by-law as to deprive the holders of preferred stock from so selecting the secretary and treasurer and that under such amended by-law and in pursuance of the fraudulent purpose aforesaid, voted for and elected or pretended to elect said Nichols secretary and treasurer, and thereafter employed him as a bookkeeper at a salary of \$100 per month; that on account of the unfriendly feeling existing between Nieukirk and the board of directors caused by the mismanagement and misconduct of the said Nieukirk, Kelseys and Nichols, and because of the inexperience of said Nieukirk and his extravagant management in the conduct of the said business, the capital stock of said company is becoming impaired and endangered, and that said corporation is in imminent danger of insolvency and unless protected by order of the court will become entirely valueless; that plaintiff has no plain, speedy and adequate remedy at law.

The foregoing is the substance of the allegations of the complaint, none of which are denied by the respondents. That

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being true, we think the allegations amply sufficient to warrant the court in appointing a receiver. The utter incompetency of Nieukirk is shown. A conspiracy is shown to exist between him and other of the directors to loot said corporation of all its profits in the mercantile business and of the profits of the company. Under his management large debts have accrued against the company and contrary to the order of the board of directors. Salaries of the officers and of the employees have been increased and employees not required by the business retained on the pay-roll. The business of the company has decreased from \$15,000 a month to about \$5,000. Credit has been indiscriminately given to the amount of about \$20,000, much of which is absolutely worthless. Stock that belonged to said company has been fraudulently issued to the Kelsey family. A good account of \$758.14 against Altha B. Kelsey has been transferred against a deceased man who left no estate in fraud of the rights of the stockholders. It appears that money was paid for the preferred stock, and a by-law was adopted giving the stockholders holding the preferred stock the right to elect the secretary and treasurer. This was fraudulently amended by said Nieukirk and his co-conspirators so as to permit the secretary and treasurer to be elected by themselves and against the interests of the stockholders who held the preferred stock, and it is admitted that if said corporation is not already insolvent, that insolvency stares it in the face. Notwithstanding all of those undenied allegations, it is contended by counsel for respondents that sufficient is not alleged to warrant a court of equity in granting a receiver, and that the appellants have a plain, speedy and adequate remedy at law. If the complaint does not contain allegations sufficient to warrant the appointment of a receiver, it would be most difficult to make allegations sufficient for that purpose. Under the provisions of subdivisions 5 and 6 of section 4329 of the Revised Statutes, the appointment of a receiver is authorized where a corporation is insolvent or in imminent danger of insolvency, and also in all other cases where receivers have heretofore been appointed by the usages of

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courts of equity. The allegations are amply sufficient to show that said corporation is grossly mismanaged and is in imminent danger of insolvency. In *Gibbs v. Morgan*, 9 Idaho, 100, 52 Pac. 733, under section 4329 of the Revised Statutes, this court held that upon proper application a receiver would be appointed for a corporation *pendente lite*. The court said in that case: "As far as possible courts of equity should adapt their practice to the existing conditions of the business world and apply their jurisdiction to the changed conditions and cases arising thereunder, and should not too strictly adhere to forms and rules established under different circumstances and decline to administer justice and enforce rights for which there is no other remedy."

The supreme court of Montana in *State v. Second Judicial District Court*, 15 Mont. 324, 48 Am. St. Rep. 682, 39 Pac. 316, 27 L. R. A. 392, under a statute identical with section 4329, held that the court had jurisdiction to appoint a receiver; and that court, referring to the *French Bank Case*, 53 Cal. 550, says: "In the California case an important element in the decision as it appears was that the appointment of a receiver acted as a dissolution of the corporation," and says further, "the receiver is not to wind up the corporation under his appointment; he is simply to manage the affairs of the same while charges of the most outrageous frauds of the managers and officers are being investigated in the trial of the action." So in the case at bar the appointment of a receiver does not act as a dissolution of the corporation. The receiver would only manage the affairs of the corporation during the investigation of the charges of conspiracy, incompetency and fraud.

In Smith on Receiverships, section 225, it is stated: "Where upon application of a stockholder it is shown that the directors and officers of the corporation are mismanaging its affairs as for their own personal advantage and gain," a receiver will be appointed; and "Where the majority stockholders are clearly violating the chartered rights of the minority and putting their interests in imminent danger," a receiver

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will be appointed. In section 228 it is said: "Where, however, the conduct of the officers of a corporation is satisfactorily established as fraudulent, it is not only proper but it is the duty of the court to wrest from such officers the management of the company and place the company in the charge of a receiver."

In *Gilbert v. Block*, 51 Ill. 516, it is held that if possession of the defendants is obtained by fraud, or that the income is in danger of loss from neglect, waste or misconduct, a receiver will be appointed upon proper application, and in *Re Lewis*, 52 Kan. 660, 35 Pac. 287, that the mismanagement, diverting of funds, applying assets to the benefit of officers, are grounds for a receiver. (See *Stevens v. South Ogden Land etc. Co.*, 14 Utah, 232, 47 Pac. 81.) In *Ponca Mill Co. v. Mikesell*, 55 Neb. 98, 75 N. W. 46, it was held that a receiver would not be appointed merely because of difference of opinion between officers or holders of the majority of the stock as to proper policy of managing the corporate affairs, but that one would be appointed when it was shown that the officers and the holders of a majority of the stock are fraudulently managing the corporate business, converting the property to their individual use, and abusing their powers to the injury of the other stockholders. *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412, was a case something like the one at bar and furnishes an instance of a gross abuse of the trust. It is there held that the law requires of the manager the utmost good faith in the control and management of the corporation as to the minority. The court said: "It is the essence of the trust that it shall be so managed as to produce for each stockholder the best possible returns for his investment. The trustee has so far absorbed all returns." So in the case at bar it is shown that Nieukirk and his favorites have not only absorbed all of the returns, but are about to wreck the company. (See Clark & Marshall on Corporations, sec. 556.)

In *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, 26 N. W. 184, the court holds that a receiver may be appointed when

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the affairs of a corporation are being mismanaged and its assets be in danger of being lost to the stockholders. The rights of a majority of the board of directors or a majority of the stockholders to loot and mismanage the business of the corporation is not protected by our law simply because it is a corporation. Such rights are no more protected to a corporation than they are to a partner of a copartnership. In this age of trusts and corporations, the managers thereof must be held to as strict an accountability for the fair and honest conduct of the business as a partner conducting the business of a partnership. The allegations of the complaint require the appointment of a receiver, and the judge erred in not appointing one. His action in refusing to appoint a receiver is reversed and the cause remanded with directions to appoint one. Costs of this appeal are awarded to appellants.

Stockslager, C. J., concurs.

Ailshie, J., expresses no opinion.

ON PETITION FOR REHEARING.

STOCKSLAGER, C. J.—Respondents in this case filed their petition for what is termed a limited rehearing, "with a view to the correction of what we think is an error in the order of the court directing that a receiver be appointed, and ask that said order be modified to permit respondents to answer the complaint in said cause and deny the allegations of said complaint, to the end that complete justice may be done." So says the petitioner. Again it is said: "Respondents now stand ready, and at all times have stood ready, to show the falsity of all the allegations of the complaint upon which a receiver is asked to be appointed, except the liability to insolvency, and to show that said liability is caused by the wrongful acts of the appellant."

As shown by the complaint in this action, the substance of which is embodied in the opinion, a number of reasons were enumerated why a receiver should be appointed to take charge of the property of this corporation and preserve it from waste,

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and whether a direct charge of insolvency was alleged or not, the allegations were sufficient to show that the ultimate result of the management would be insolvency. These allegations were met by a demurrer which was sustained by the learned trial judge; but this court was of the opinion that the showing was sufficient to warrant the appointment of a receiver under the provisions of subdivision 5 of section 4329 of the Revised Statutes. It says a receiver may be appointed "when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights."

Learned counsel for respondents says that his time was too limited to prepare an answer and meet the issue at the time the application was set for hearing. Beyond doubt an application for an extension of time in which to prepare his answer would have been granted by the lower court, and the allegations of insufficiency, incompetency, with other more serious and far-reaching charges, were of a nature that should have been met by a positive denial other than by demurrer, which in effect admits the truth of the allegation, but denies that the plaintiff is entitled to the relief demanded.

As to respondents' right to answer in the lower court now, this court has nothing to say; that right is governed by statute.

We find no merit in the petition, and it is denied.

Sullivan, J., concurs.

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Argument for Appellant.

(February 19, 1906.)

NORTH & DOUGLAS, a Copartnership Composed of
GEORGE NORTH and RICHARD DOUGLAS, Re-
spondent, v. T. J. WOODLAND, Appellant.

[85 Pac. 215.]

SHEEP INFECTED WITH SCAB—DUTY OF OWNER OR EMPLOYEE—SUFFICIENCY OF PLEADING.

1. In a civil action for damages, under section 21 (Sess. Laws 1901, p. 151), *scienter* need not be alleged or proven where carelessness or negligence is averred.

2. In declaring the acts mentioned in the above section punishable by fine, imprisonment, or both, the legislature was exercising the police powers of the state, and in such case the complaint need not allege that the defendant knew the act complained of was unlawful.

3. Under the provisions of sections 21 (*supra*), 23, and 6886 of the Revised Statutes, a complaint that alleges that the injury complained of was the result of the careless and negligent acts of defendant is sufficient.

4. Where the instructions to the jury fairly state the law on all the issues involved, it is not error to refuse requests of defendant, even though they may be a repetition of the law of the case.

5. Where a verdict is not in excess of the demand of plaintiff's complaint, and no error appearing in the admission of the evidence or instructions of the court, and there is any evidence tending to prove the amount of damages, this court will not examine the evidence to ascertain whether the verdict is excessive or not where the defendant fails or refuses to submit evidence.

(Syllabus by the court.)

APPEAL from the District Court of Sixth Judicial District for Bingham County. Hon. J. M. Stevens, Judge.

Action for damages from which defendant appealed. *Judgment affirmed.*

J. W. Jones and Gray & Boyd, for Appellant.

We contend that an averment in the complaint of knowledge on the part of the defendant as to the condition of his sheep,

Argument for Appellant.

as well as proof of such knowledge, is essential to a recovery herein. Section 9. of the act to suppress contagious and infectious diseases of sheep (Idaho Sess. Laws, 1901, p. 145), recognizes this doctrine that *scienter* must be alleged and proved in cases of this character. (*Patee v. Adams*, 37 Kan. 133, 14 Pac. 505; *Wade on Notice*, 2d ed., 271; *Chitty on Pleading*, 69; *Voorman v. Lawyer*, 13 Johns. 339; *Dearth v. Baker*, 22 Wis. 73; *Lyke v. Van Leuven*, 4 Denio, 127; *Missouri Pac. Ry. Co. v. Finley*, 38 Kan. 550, 16 Pac. 951, 956; 2 Am. & Eng. Ency. of Law, 2d ed., pp. 364, 381, 382, and cases there cited; *Hawks v. Locke*, 139 Mass. 205, 52 Am. Rep. 702, 1 N. E. 543; 2 Cyc. 333, 337, and cases cited; *Van Leuven v. Lyke*, 1 N. Y. 515, 49 Am. Dec. 346; 1 *Estee on Pleading*, 4th ed., secs. 1870, 1872; *Clarendon Land etc. Co. v. McClelland Bros.*, 86 Tex. 179, 23 S. W. 576, 1100, 22 L. R. A. 105; 89 Tex. 483, 59 Am. St. Rep. 70, 34 S. W. 98, 35 S. W. 474, 31 L. R. A. 669.)

The testimony for the plaintiffs shows indubitably that they were guilty of contributory negligence, resulting in the loss complained of herein. For this reason, they cannot recover. "Evidence ought not to be admitted of facts not put in issue by the pleadings." (*Haner v. Northern Pac. Ry. Co.*, 7 Idaho, 305, 62 Pac. 1028.) None of the instructions asked by the plaintiffs and given by the court are predicated on belief from the evidence, or words of a like purport, and they are therefore erroneous. (*Blashfield's Instructions to Juries*, sec. 79, and cases cited; *Sackett's Instructions to Juries*, 2d ed., and cases cited.)

Plaintiffs' Instruction No. 2 is contrary to law and erroneous, in that it assumes that there was a difference in the value of the sheep at time of mixing and at time of turning them back, instead of leaving it to the jury to find whether there was a difference or not. This is a fact to be found and not assumed. (*Barrelett v. Bellgard*, 71 Ill. 280.)

Plaintiffs' Instruction No. 4 is erroneous, in that it assumes that eleven head of sheep were never returned. (*Sackett's Instructions to Juries*, 2d ed., sec. 16, and cases cited; *Blashfield's Instructions to Juries*, sec. 29 et seq., and cases cited.)

Argument for Respondent.

Hansbrough & Adamson, for Respondent.

When sheep break out of their inclosure and communicate a disease known as hoof rot or hoof distemper to other sheep, it is not necessary to prove that the defendant had knowledge of such disease in order to recover damages for such infection. (*Lynch v. Grayson*, 5 N. Mex. 487, 25 Pac. 992. Affirmed in *Grayson v. Lynch*, 163 U. S. 468, 16 Sup. Ct. Rep. 1064, 41 L. ed. 230; *Croff v. Cresse*, 7 Okla. 408, 54 Pac. 558.)

In an indictment against a party for driving scabby sheep across the range, it need not be alleged that the accused knew that the sheep had scab. (*State v. Sterritt*, 19 Or. 352, 24 Pac. 523.) Section 21 of the Idaho Session Laws of 1901, page 151, recognizes the doctrine that *scienter* need not be alleged or proven. Respondent was entitled to all consequential damages. (Idaho Sess. Laws 1901, p. 150, sec. 19.)

Under a general allegation of damage the plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of, for the law implies that they will proceed from it. (2 Sutherland on Damages, 3d ed., sec. 418, and cases cited; *Rauma v. Bailey*, 80 Minn. 366, 83 N. W. 191; *Moyer v. Gorden*, 113 Ind. 282, 14 N. E. 476; *Wrought Iron Range Co. v. Graham*, 80 Fed. 474, 25 C. C. A. 570; *Smith v. Pittsburgh etc. Ry. Co.*, 90 Fed. 783; *City of Abilene v. Wright*, 4 Kan. App. 708, 46 Pac. 715.)

"If there is an issue of fact to be determined from the evidence under proper instructions from the court, as to the law, it is error for the court to charge the jury that the plaintiff is entitled to recover; but if the evidence makes the case so clear for the plaintiff that a verdict for the defendant would be contrary to the evidence, the error is immaterial." (*Levitzky v. Canning*, 33 Cal. 299.) The court is authorized to direct a verdict for either party when a contrary verdict could not be sustained by the evidence. (Hughes on Instructions to Juries, sec. 127, and cases cited; *Page v. Tucker*, 54 Cal. 121.) The court has power to direct a verdict when there is no conflict in the evidence. (*Martin v. Ward*, 69 Cal. 129, 10 Pac. 276; *Chen-*

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ery v. Palmer, 6 Cal. 122, 65 Am. Dec. 493; *Watson v. Damon*, 54 Cal. 278; *Page v. Tucker*, 54 Cal. 121.)

STOCKSLAGER, C. J.—This action is for the recovery of damages, plaintiffs alleging that defendant wrongfully and negligently permitted his sheep, which were infected with scab, and not in charge of a herder, to run upon the public highway and mix with the sheep of plaintiff, which were being driven along such highway, free from scab or other infectious disease, fat and in good condition and not upon quarantined ground; that because of such mixing and intermingling of sheep, the plaintiffs were compelled to dip those which came in contact with defendant's sheep and otherwise to treat them, to the injury of such sheep and to plaintiffs' damage in the sum of \$477.55. Defendant filed a general demurrer which was overruled, whereupon he filed an answer and cross-complaint. The answer denies all the material allegations of the complaint. The cross-complaint sets up negligence on the part of plaintiffs in permitting the sheep to be mixed and commingled, alleging that by reason of the careless and negligent manner plaintiffs, their agents and employees, handled their sheep in driving along the highway, about two hundred and sixty of plaintiffs' sheep escaped from their herd and entered through the fence and upon the feed ground of defendant and without defendant's knowledge or consent mixed with his sheep. Plaintiffs answered this cross-complaint denying the material allegations thereof. At the trial of the cause a jury was impaneled and a verdict was returned in favor of the plaintiffs for the sum of \$464.03, for which amount judgment was entered. The appeal is from the judgment and from an order overruling a motion for a new trial. Counsel for appellants assign sixteen errors and urge all of them in their brief. The first is that the demurrer to the complaint should have been sustained. They say: "The action is one *ex delicto* for damages, and the right of plaintiffs to recover depends solely upon their proper allegation and proof of negligence on the part of defendant only." Again they say: "It was not alleged in the complaint that the sheep of de-

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fendant were quarantined because of their having any infectious disease, nor was it alleged that defendant knew or had reason to believe that his sheep had the scab or any infectious disease at the time the intermingling occurred, and for these reasons the attempted allegation of negligence on the part of the defendant is insufficient. It consists solely in the statement that defendant carelessly and negligently permitted the herds to get together and become mixed on the public highway, by reason of there being no herder with defendant's said sheep." This statement in the brief of learned counsel for appellant fairly states the issue involved in this action. In other words, if the doctrine of *scienter* is applicable, the demurrer should have been sustained; otherwise it was not error to overrule it. An examination and construction of the various statutory provisions of this state relating to the privileges granted flock-masters and their employees in handling their herds on the public domain and the public highways of the state, together with the restrictions cast upon sheep, infected with what is commonly called scab, or any other infectious or contagious disease, must necessarily determine the important question at issue, as the constitutionality of none of the provisions is questioned. It is apparent that all the legislation on this question has been with the view of entirely eradicating scab and other diseases from the flocks of the state, and whilst in some instances the remedy may seem harsh and even oppressive, nevertheless it is evident that such legislation has met with the approbation of those engaged in the sheep industry in this state or it would have been defeated, no other industry being interested in the subject matter of such legislation. The first legislation we find bearing on this question is section 6886 of the Revised Statutes of 1887; it says: "Any person owning sheep infected with scab or any other infectious disease, who fails to keep the same secure from contact with other sheep or who moves or drives the same upon any highway, byway or across any range where other sheep are liable to range or be driven, without first obtaining a written permission of the sheep commissioner as provided in section 1221 of the Political Code, is guilty of a misdemeanor, and must

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be fined in any sum not less than two hundred and fifty nor more than two thousand dollars." Section 1221 above referred to and section 6886, *supra*, were enacted by the twelfth session of our territorial legislature and were incorporated into the Revised Statutes of 1887. The conditions and penalties are practically the same. Section 1221, however, provides that "the owner of any sheep infected with scab . . . may move the same by first obtaining a written permission of the sheep commissioner of the county wherein he wishes to move them, which permission must state the manner in which they are to be moved, and the place to which they are to be moved and the route designated; but the sheep commissioner must not give permission to any person to move any sheep so infected across any range where healthy sheep are accustomed to range." These two sections seem to have been sufficient for the purpose for which they were intended until the sixth session of our state legislature (1901), when an act entitled "An act to suppress contagious and infectious diseases of sheep, to create the office of sheep inspector and deputy state sheep inspectors . . . and repealing all acts in conflict," was enacted. Section 9 of this act provides: "Whenever, upon an examination of any bands or herds of sheep kept or herded in any county of the state of Idaho, the deputy sheep inspector of such county or district thereof shall find such sheep, or any portion of them, affected or infected with the scab or scabbies, or any other infectious or contagious disease, the entire band or herd shall be considered as infected and treated as such and he shall immediately quarantine the same and forthwith notify the owner or person in charge of such sheep, in writing." Section 21 of the same act provides: "Any person or persons owning or having under their control sheep or bands of sheep which have become infected with the scab or other infectious or contagious disease, for a period of fifteen days without reporting the fact to the deputy sheep inspector of such county or district thereof where such sheep are situate, in writing, shall be guilty of a misdemeanor." Section 23 provides: "In any action or proceeding, civil or criminal, arising under this act, and all persons having any interest

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in sheep or controlling the same, and concerning which said action or proceeding is had, shall be deemed the owner of said sheep, and shall be liable, jointly and severally, for such violation. Any herder or shepherd or other person in charge of sheep may be sworn to give any deputy sheep inspector any and all information as to the condition of the sheep in his charge, to the best of his knowledge, on being requested so to do by the deputy, and upon refusing to do so shall be guilty of a misdemeanor."

This is all the legislation we find bearing directly upon the question under consideration, and it only remains for us to ascertain from the language of the several sections quoted just what was intended by the lawmakers. There can be no question of the intent of the legislature in the passage of all acts relative to scabby sheep; there is no other infectious or contagious disease known to exist among sheep in this state; hence it is conclusive that all legislation is aimed at the eradication of this pest. It is also beyond question that all efforts have been toward the one common purpose of confining the disease to the band where discovered, and by a system of thorough dipping to eradicate it when discovered as quickly as possible. The quarantine law was enacted with this object in view. That parties owning or being in possession of sheep infected with scab should report such fact to the deputy inspector of the county or district within fifteen days, only bears out the conclusion that prompt and heroic efforts are to be made by all parties concerned to effectually eradicate the disease from the flocks of the state. If the provisions of our law relative to scab are to be construed as urged by counsel for appellant, the entire system is a farce. It would be very convenient for the owner of a band of sheep not to discover scab until a convenient season and then have fifteen days thereafter in which to report such discovery to the deputy inspector for his county or district. The law requires the owner of sheep, as well as anyone in charge thereof, to report their condition, if scab or other infectious or contagious disease is discovered, to the sheep inspector within fifteen days after such discovery, thus enjoining, upon the owner and

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his employees constant care and watchfulness over their flocks. Again, it is a well-known fact that no one has the opportunity of discovering scab so readily as the herder or person in daily charge of the sheep, and when it develops, it will not be long before he knows it. It has none of the characteristics of what is commonly called "Texas fever." That disease is never apparent in the native Texas cattle, but other cattle coming in contact with Texas cattle, or herded on a range over which they have passed may become inoculated; not so with the scab; it is not difficult to detect; it leaves its marks on every sheep affected, and any practical herder is soon aware of its presence and may find it if he make the effort. As we view it, the object and purpose of our law is to make the owner and herder diligent and careful and report any evidence they may have of the existence of scab in their flocks, and it provides a severe penalty for neglecting to do so. When we ask the reason for the legislation there is but one answer and that is the complete eradication of the disease from the flocks of the state. It is a part of the public policy of the state and comes within the exercise of its police powers. The law presumes that every man knows the condition of his sheep and requires him to report the existence of scab within fifteen days after it makes its appearance—not fifteen days after he has reported it to some one else other than the authorized sheep inspector—and were it otherwise, as is said by counsel for respondents, "a person could drive his scabby sheep upon the public highways and herd and drive them upon the public domain where other sheep without infection were herded and driven; they could infect all the ranges within the state with scab, and all the sheep upon them, and when arrested or a civil action was brought for damages, they could escape the consequences of their wrongful acts by merely saying that they had no notice or knowledge that the sheep were infected with scab." This statement is undoubtedly true, and we think the legislature intended to overcome the difficulties above suggested by section 21 (Sess. Laws 1901, *supra*). It would be practically impossible for the inspector to inspect the innumerable number of sheep within his territory; they

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are usually kept as far from civilization and the public highways of the state as possible from early spring until late fall, then if not on feed grounds, off on the desert and away from habitations. If the duty of discovering scab and quarantining devolved upon the inspector, the law would be a nullity, and sheep upon the public range would be constantly exposed to scab winter and summer. The law was intended to make each owner the guardian of his own flocks, and even goes so far as to impose the duty and add a penalty upon the herder or person in charge.

In discussing a law similar to ours, the supreme court of Oregon in *State v. Sterritt*, 19 Or. 352, 24 Pac. 523, which was an indictment returned by the grand jury charging the defendant with "unlawfully moving sheep infected with scab from place to place without first having obtained a traveling permit therefor." The information did not charge that the defendant knew the sheep were infected with scab at the time of their removal, and for this reason defendant demurred to the sufficiency of the indictment. This demurrer was overruled. The court says: "The first objection insisted upon was that the indictment failed to allege knowledge of the defendant that the sheep had the scab at the time of their removal. In a very large class of offenses, and mainly those that were classed as *mala in se* at common law, guilty knowledge is necessary to complete the offense, and it must be alleged. But in that other class, wrongs which are forbidden by statute, and more especially those offenses which are made punishable in furtherance of the public policy of the state, such as the exercise of the police powers, the collection of revenue, and the like, are punishable whether the offender had guilty knowledge or not. This distinction was lately sustained in this court in *State v. Chastain*, 19 Or. 176, 23 Pac. 963, and is adhered to. The offense under consideration belongs to the latter classification, and is punishable whether the accused party knew the sheep were diseased or not."

If a criminal action can be maintained under the statute of Oregon upon which the above prosecution was based without alleging and proving guilty knowledge, why may not a civil

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action for damages be maintained under section 21, *supra*, without such allegation and proof; we can see no valid reason why not. The authorities cited by appellant do not reach the issue involved here.

In *Patee v. Adams*, 37 Kan. 133, 14 Pac. 505, the court considered and discussed a case wherein the defendant in good faith purchased in the market at Kansas City certain cattle, shipped them to Manhattan, in Kansas, where they were unloaded into the stockyards of the Union Pacific Railway, and were immediately seized by virtue of a process issued by a justice of the peace, the possession being withheld from defendant, he having no opportunity to examine the cattle; even if the "Texas, splenic" or "Spanish fever" could be detected by an examination as readily as scab, the defendant was in no wise to blame, as it is shown that plaintiff's cattle were diseased by the cattle of defendant whilst they were in the custody of the officer. The court instructed the jury that "if the defendant knew or had reason to know, or could by ordinary diligence have known, that the cattle were diseased, . . . you will find for the plaintiff." This instruction is upheld by the court. It is said in the opinion: "Doubtless, the legislature has the authority to dispense with the necessity of alleging and proving knowledge; but before a party who is without fault, or without knowledge that his cattle can cause injury, can be held liable, the legislative design to create such liability should be 'plainly pronounced.'"

Under the head of "Proof of Scienter"—when necessary—learned counsel for appellant cite volume 2 of American and English Encyclopedia of Law, 364. The text says: "If domestic animals are rightfully in the place where they do the injury complained of, the owner will not be liable unless he had knowledge of the vicious propensity of such animal; and in an action for such injuries, knowledge on the part of the owner must be alleged and proved." Cases are cited by the author under this text from a large number of states, but an examination of them discloses that they follow the subject laid down in the text, and only refer to the vicious or dangerous character of domestic animals and the duty of

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the owner thereof in protecting the public from injury therefrom. Our attention is also called to pages 381, 382, same book, and under the same heading we find this text: "In those jurisdictions where stock is allowed to run at large, and statutes have been enacted making the owners of diseased or distempered cattle liable for any communication of such disease, it is generally held that *scienter* on the part of the owner of such diseased cattle should be alleged and proved." One of the cases cited here and really the one upon which counsel for appellant seems to place the most reliance, is *Patee v. Adams*, 37 Kan. 133, 14 Pac. 505; the author says: "The theory of the statute is that the liability arises upon the negligence of the party who drives, or causes to be driven, the cattle that communicate the fever; and how can negligence be attributed to those who go into a market in the state and purchase such cattle when they have no notice, and no facts exist by which they would be chargeable with notice that the cattle had the fever, or were liable to communicate it? The rule of the common law in such cases is that knowledge is indispensably necessary to a recovery. This author also cites *Barnum v. Vandusen*, 16 Conn. 200, where defendant's sheep trespassed upon plaintiff's land and communicated to plaintiff's sheep a disease known as hoof distemper, there being no sufficient justification for the trespass; it was held that, "in order to recover damages it was not necessary to show that defendant had knowledge of the diseased state of his sheep but that such evidence was competent to enhance the damages," etc. Other authorities are cited, but they do not convince us that the doctrine announced in *State v. Sterritt* is not the correct one in cases of the character of the one under consideration.

It is next insisted by counsel for appellant that plaintiff was guilty of contributory negligence resulting in the loss complained of herein. For this reason they cannot recover. The complaint alleges, among other things, that said sheep were allowed to become mixed and to get together by reason of the negligence and carelessness of the defendant as aforesaid, and without any fault of the plaintiffs. Evidence was

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submitted on the question. The first witness was C. A. Valentine. He says: "Mr. Woodland had one band of sheep on the west and one on the east side of the road; there was no one with the band on the west side when we got there and their sheep had been coming out onto the road; . . . there is a lot of willows growing and we could not see them until we got close to them, and they started coming out on the road and getting into our sheep. . . . After we had them mostly all cut off and going back to their feed ground, then Mr. Woodland and two or three of his men came over from on the east side; no one was with this band on the west side." Willard Christianson testified: "It took us about fifteen minutes to separate the sheep; Mr. Woodland's sheep were right along the road when I first saw them there; the feed ground extends right up to the road; and there was no one with the sheep when the mix-up began." It is shown by the evidence that as soon as the men in charge of respondents' sheep discovered the sheep of appellant near the highway through which they were driving respondents' sheep, they used every effort within their power to prevent the mix-up. It was clearly the duty of appellant to have some one in charge of his sheep at all times, especially when they were being fed and held near the highway through which other sheep were privileged to pass, whether they were diseased or not. It was shown that the fence was not sufficient to keep them from passing back and forth from the feed grounds to the highway, and with ordinary diligence on the part of appellant his sheep could have been kept back from the highway whilst respondents' sheep were passing through. This duty he owes to the public who have license to the use of the highway, and, in our opinion, it was his negligence in not having a herder in charge of his sheep that resulted in the mix-up, and consequently the damage resulting therefrom to respondents. Mr. Douglas, one of the respondents, testified to a conversation with appellant the day following the mix-up as follows: "I said, 'Mr. Woodland, you know better than I do how those sheep have been run, and you know whether they have scab, and if you will guarantee me that

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those sheep will not break out, I will take them out.' And he said, 'I will advise you not to take the sheep out.' I said, 'What will you do with the sheep?' 'I will take care of them,' he says, 'and dip them twice and turn them over to you clean, so you can put them in your herd and go any place with them.' Q. I will ask you to state whether or not at that time Mr. Woodland told you he had scab in his sheep?" Appellant's counsel objected to this question on the ground that "it was not alleged in the complaint that the defendant knew or had reason to know that his sheep had the scab, also because the question is leading." The court overruled the objection and the witness answered: "Mr. Woodland told me that he had scab and had had it for some time, and directed me to leave them in there and he would dip them twice and turn them back to me." There was no error in this ruling of the court. The evidence was material to respondents to establish a reason for leaving their sheep with appellant's. It is also shown by this evidence that appellant not only knew at the time of the mix-up that his sheep had the scab, but had known it for sometime prior thereto, and this evidence is in no wise contradicted. This being true, appellant should have been unusually diligent in holding his sheep on his feed grounds and especially keep them from passing through the fence upon the highway where clean sheep were likely to be driven at any time.

Errors are assigned, based on the instructions given the jury and the refusal of the court to give certain requests of appellant. We have carefully examined the instructions given by the court, and in our view of the case we think they fully state the law. We find no error in the record and the judgment is affirmed with costs to respondents.

Ailshie, J., and Sullivan, J., concur.

Points Decided.

(February 19, 1906.)

DAVID McNUTT, Appellant, v. LEMHI COUNTY et al.,
Respondents.

[84 Pac. 1054.]

**RIGHT OF APPEAL BY COUNTY—COUNTY EXPENDITURES ORDINARY AND
EXTRAORDINARY—COUNTY INDEBTEDNESS IN EXCESS OF REVENUE—
CONSTITUTIONAL PROVISION.**

1. Answer made on behalf of the county in this case examined and held sufficient to constitute a defense to plaintiff's cause of action.

2. Section 1776 of the Revised Statutes, as amended by act of February 14, 1899, provides the right of appeal only for persons and taxpayers, and does not contemplate the county itself as a municipal corporation taking an appeal from the action or order of its own board of commissioners.

3. Under the provisions of section 3, article 8 of the constitution, no indebtedness or liability can be lawfully incurred by a county for any given year in excess of the income and revenue of such county for the same year without the assent of two-thirds of the qualified electors of the county voting in favor of incurring such indebtedness or liability at an election held for that purpose, unless such indebtedness or liability is incurred for an ordinary and necessary expense as authorized by the general laws.

4. Where county warrants were issued in the sum of \$6,350 for the construction of a wagon road and the question of incurring such indebtedness was not submitted to a vote of the people, and the whole thereof was in excess of the income and revenue of the county for the year in which such indebtedness was incurred, and no provision was made for the payment thereof, such indebtedness is in violation and contravention of the provisions of section 3, article 8 of the constitution, and is therefore void.

5. A county as a municipal corporation cannot ratify an act done in direct violation of the constitution, and in such case the doctrine of ratification cannot be invoked.

6. The necessity for county warrants to be issued in conformity with the requirements of section 2006 of the Revised Statutes which provides that "All warrants must distinctly specify the liability for which they are drawn and when it accrued," considered.

(Syllabus by the court.)

Argument for Appellant.

APPEAL from the District Court of the Sixth Judicial District for Lemhi County. Hon. J. H. Stevens, Judge.

R. P. Quarles and Gus B. Quarles, for Appellant.

The amended petition or affidavit, and the stipulation of facts, show that none of the orders were ever appealed from, hence those orders are valid and bind the county. (*Johnson v. Savidge* 11 Idaho, 204, 81 Pac. 616; *Morgan v. Board of Commrs*, 4 Idaho, 418, 39 Pac. 1118; *Picotte v. Watt*, 3 Idaho, 447, 31 Pac. 805; *Rogers v. Hays*, 3 Idaho, 597, 32 Pac. 259; *Dunbar v. Board etc.*, 5 Idaho, 407, 49 Pac. 409; *Corker v. Elmore Co. Commrs.*, 10 Idaho, 255, 77 Pac. 634; *School Dist. No. 25 v. Rice*, 77 Idaho, 99, 81 Pac. 155; *In re Grove Street*, 61 Cal. 453; *Babcock v. Goodrich*, 47 Cal. 488.)

In the case at bar no allegation of fraud is made, and no suspicion of unfairness or any intent to do other than their duty is shown against the board of commissioners in letting the contract to Penwell. (*Reclamation Dist. No. 537 of Yolo County v. Burger*, 122 Cal. 442, 55 Pac. 156.)

County commissioners or boards of supervisors act in a quasi judicial capacity, and in the absence of fraud, their decisions over matters within their jurisdiction, upon questions of fact, are without remedy other than by appeal, in the courts. (*McBride v. Newlin*, 129 Cal. 36, 61 Pac. 577; *Alameda Co. v. Evers*, 136 Cal. 132, 68 Pac. 475; *Santa Cruz Co. v. McPherson*, 133 Cal. 282, 65 Pac. 574.) Being within the scope and general powers of the board of commissioners, they having let the contract for the construction of a needed road, which has been received by the county as shown by the petition and stipulation of facts, the county thus receiving a benefit, and the provision of the constitution not having been violated, we say that the matters are *res adjudicata*, and not subject to collateral attack as made by respondents in this case. (*County of Sacramento v. Southern Pacific Co.*, 127 Cal. 217, 59 Pac. 568, 825.)

Argument for Respondents.

John Sinclair, Prosecuting Attorney of Lemhi County, for Respondents.

The building of the said wagon road was an extra-municipal power, and an extraordinary expenditure of the county, and could only be authorized and incurred under section 1762 of the Revised Statutes. "Commissioners of highways, in laying out highways, act under special statutory authority, and it must appear on the face of the proceedings, or by proof *aliunde*, that they acquired jurisdiction in the particular case." (*Miller v. Brown*, 56 N. Y. 383.)

A creditor by accepting the warrant drawn on the particular fund impliedly agrees to rely solely on such fund for payment of the warrant. (*Argenti v. San Francisco*, 16 Cal. 255; *Rose v. Estudillo*, 39 Cal. 270; 21 Am. & Eng. Ency. of Law, 2d ed., 22, and authorities.) It was held in *Rice v. Milwaukee*, 100 Wis. 516, 76 N. W. 341; "That as the future income from licenses is entirely uncertain in amount, and not dependent on any act of the city, moneys to be derived during the year cannot be considered on the question whether a city has exceeded its debt limit." The orders of the board could be attacked at any time, either directly or collaterally. (*Fremont County v. Brandon*, 6 Idaho, 486, 56 Pac. 264; *Dunbar v. Canyon County*, 5 Idaho, 407, 49 Pac. 409.)

Provisions similar to section 3 of article 8 of the constitution of the state of Idaho have been incorporated in the constitution of many states for the establishment of a financial system on a basis that should closely approximate the basis of cash, and the authorities bearing on the subject are very numerous. It will be sufficient to refer to the authorities of our own state. (*Bannock Co. v. Bunting*, 4 Idaho, 156, 37 Pac. 277; *Theiss v. Hunter*, 4 Idaho, 788, 45 Pac. 2; *Ada Co. v. Bullen Bridge Co.*, 5 Idaho, 79, 88, 47 Pac. 818, 36 L. R. A. 367; *Dunbar v. Canyon Co.*, 5 Idaho, 407, 49 Pac. 409; *Boise City v. Union Bank etc. Co.*, 7 Idaho, 342, 63 Pac. 107.) Partial payments on a contract of a municipal cor-

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poration do not amount to a ratification. (*Milford v. Milford Water Co.*, 124 Pa. St. 610, 17 Atl. 185, 3 L. R. A. 122.)

It is well settled that a municipal corporation cannot validate by ratification a contract beyond its corporate powers to make, or a contract void from the beginning. (*Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 57 Pac. 777, 45 L. R. A. 420; *McCracken v. San Francisco*, 16 Cal. 591; *Grogan v. San Francisco*, 18 Cal. 590; *King v. Frankfort*, 2 Kan. App. 530, 43 Pac. 983; *Prescott v. Vershire*, 63 Vt. 517, 22 Atl. 655.) The Penwell warrants are non-negotiable instruments. (21 Am. & Eng. Ency. of Law, 2d ed., p. 26, and authorities cited; *Wells v. Monroe Co.*, 103 U. S. 74, 26 L. ed. 430; *People v. Supervisors of El Dorado Co.*, 11 Cal. 170; *Bank of Santa Cruz County v. Bartlett*, 78 Cal. 301, 20 Pac. 682; *People v. Gray*, 23 Cal. 125; *Dana v. San Francisco*, 19 Cal. 486; 1 Dillon on Municipal Corporations, sec. 487.) If the road contract is void, the warrants are void. (*Perry v. Ames*, 26 Cal. 372.) A purchaser of municipal warrants is bound to take notice of the constitutional limitation upon municipal indebtedness. (*Buchanan v. Litchfield*, 102 U. S. 178, 26 L. ed. 138; 20 Am. & Eng. Ency. of Law, 2d ed., 1142, and authorities cited.) The road cannot be returned, for the reason that other public money has been spent upon it, and it belongs to the public. (*Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed., 132, 5 Sup. Ct. Rep. 820.) The warrants do not comply with section 2006 of the Revised Statutes of Idaho. (*Bingham Co. v. First Nat. Bank*, 122 Fed. 16, 58 C. C. A. 332; *Raymond v. People*, 2 Colo. App. 329, 30 Pac. 504.)

STATEMENT OF FACTS.

This is an appeal from an order or judgment denying an application for a writ of mandate to compel Lemhi county and the commissioners and treasurer thereof to pay five certain county warrants, with interest thereon, and, if in the opinion of the court it was necessary that the commissioners be commanded to levy a special tax for the purpose of paying such warrants and interest, that the writ require them to do so. To the complaint or petition the defendants, who are respondents here, answered, pleading *ultra vires*, the statute of limi-

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tation and certain matters in bar and avoidance. The issues thus made were determined on stipulated facts, and oral and documentary evidence. Judgment was entered in favor of respondents. The record contains the pleadings, the stipulated facts and all of the evidence offered at the trial. The entire case as made and heard by the trial court is before us. It appears from the facts stipulated that on the tenth day of January, 1893, a petition signed by seventy-nine persons alleged to be resident citizens and taxpayers of Lemhi county, praying for the construction of a wagon road from Silver Star creek or Neiman's ranch to Fourth of July creek, was presented to the board of commissioners for their action thereon, which petition had been filed on the thirtieth day of December, 1892; that the petition was acted upon and approved by the board of commissioners on the tenth day of January, 1893, and that the clerk of the board was thereupon ordered to advertise for bids to construct the road—bids to be opened and considered by the board on the first day of February, 1893. So far as the record shows, the bids were not opened, if any were received under such advertisement, and nothing further was done until on the ninth day of April, 1894, at which time they made another order directing the clerk to readvertise for sealed proposals for the construction of the road, in accordance with plans and specifications then on file in the office of the clerk, and that said bids were to be opened on the tenth day of May, 1894; that such advertisement was made; that on the eleventh day of May, 1894, bids for the construction of the road were opened and considered by the board, and of all of the bids submitted the bid of one Oscar E. Penwell was the lowest, and thereupon a contract was entered into by the county with Penwell for the construction of the road according to the plans and specifications for the sum of \$5,500. After the construction of the road, viewers were appointed by the board to view and report whether the road had been constructed in accordance with the plans and specifications. The viewers reported that the road had been constructed according to the plans and specifications, and on the twenty-first day of July, 1894, the board accepted the

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report of the viewers, and the road was received by the board. The board thereupon ordered warrants to be drawn on the general road fund for the amount of the original contract price, to wit, \$5,500, and the sum of \$850 for extra work done thereon, making a total of \$6,350, and thereupon the warrants of the county were executed and delivered to Penwell under order of the board. These warrants were all in the following form, the only difference being as to the numbering and amounts for which drawn: "No. 44. The State of Idaho, Lemhi County. The Treasurer of the County of Lemhi: Pay to O. E. Penwell one thousand dollars, out of any money in the county road fund. Given at the courthouse, at Salmon City, this 21st day of July, 1894. By order of the board of county commissioners.

"\$1,000.00

TIMOTHY DORE,
"County Auditor."

All of the warrants were on the twenty-third day of July, 1894, presented to the county treasurer for payment, but none of them were paid, and the treasurer indorsed thereon the fact of the presentation and of nonpayment thereof for want of funds, and the warrants were then and there duly registered by him. In the month of January, 1899, two of the warrants for \$1,000 each were paid by the county, and thereafter, in January, 1900, another warrant for \$1,000 was paid by the county, and in the month of March, 1900, the remaining warrants, viz., two for \$1,000 each, two for \$500 each, and one for \$350, were sold and transferred to the plaintiff, who is appellant here; that the warrants so sold were duly presented to the treasurer of Lemhi county on the 13th of September, 1904, and payment demanded, which was refused; that the assessment-roll of Lemhi county for the year 1892 contained the names of four hundred and twenty-four persons, and for the year 1893 the names of five hundred and nineteen persons, and for the year 1894 the names of five hundred and forty-two persons; that the levy of a property road tax for general purposes in Lemhi county for the

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year 1894 amounted to \$3,972.94, and the amount collected on the levy was \$3,891.63, exclusive of poll tax.

The foregoing allegations are followed by a statement of the warrants issued on the road fund by the board for that year, and also a statement of the amount of warrants issued upon the various funds for the year 1894, making a total of \$43,210.49; that the total amount of money received by the county for the year 1894 available for the payment and discharge of its obligations was the sum of \$32,990.29, and that the total expenditures for the year were \$43,216.92; that no provision was made by the board at the time of incurring the Penwell indebtedness, nor before, for the collection of an annual tax to pay these warrants; that no election was held at which the people of the county might vote upon the question of incurring the indebtedness; that no order was made by the board directing the Penwell warrants, or any part thereof, to be paid from a general or current expense or any other fund; that in the month of April, 1900, the board made an order finding that there was a legal warrant indebtedness, including interest, against Lemhi county amounting to the sum of \$50,877.65, evidenced by warrants against the general or several funds of the county theretofore regularly issued in payment of legal claims, among which warrants were included the warrants sued on in this action; that at an election duly held pursuant to such order more than two-thirds of the qualified voters of Lemhi county voted in favor of issuing bonds to raise money with which to pay the warrant indebtedness, and that pursuant to resolutions and orders of the board and the election so held, bonds of the county to the amount of \$25,500 were issued, and with the money realized therefrom the board redeemed warrants to that amount, but not the warrants sued on herein.

It is also stipulated that the receipts for current expenses for the year 1894 amount to \$6,250; that none of the orders of the board above mentioned were ever amended or rescinded, nor was any appeal taken therefrom.

Judgment affirmed.

AILSHIE, J.—The first assignment to the effect that the court erred in admitting any evidence on behalf of the defendant, for the reason that the amended answer did not state facts sufficient to constitute a defense, is not well taken. The answer presented issues sufficient, if found true, to defeat plaintiff's recovery—exhibit "B" introduced by defendant, and to which plaintiff objected, and concerning the admission of which he now complains, was competent for the purpose of showing the number of taxpayers within Lemhi county for the year 1892, and its admission was not error. It was a certified copy of the names of all the taxpayers of the county for that year as shown by the assessment-roll and subsequent roll for the year. This evidence, however, did not establish the fact as to what number of the taxpayers for that year were qualified voters, and not being followed up by proof to that effect amounted to nothing. (Rev. Stats., sec. 1762.)

The liabilities incurred for the year exceeded the revenue by \$10,277.63. The entire road fund of the county for 1894 amounted to only \$3,972.94, while the warrants issued for that year on the road fund amounted to \$9,631.45. None of the orders of the board were ever appealed from and it is now contended that they are final. It should be observed, however, that section 1776 of the Revised Statutes, as amended February 14, 1899, applies only to persons and taxpayers and has no application to the municipality itself. The legislature never contemplated that the board of commissioners would ever want to appeal from their own action in making an order or paying a claim. In *County of Ada v. Bullen Bridge Co.*, 5 Idaho, 88, 47 Pac. 818, 36 L. R. A. 367, the court said: "It is the opinion of this court that the provisions of section 1776 of the Revised Statutes do not apply to a case where the county is seeking to protect itself against the illegal or fraudulent acts of its board of commissioners in the issuance of warrants. And we think there will be nothing found in the other decisions of this court in any way contravening this view." The county itself through its board of commissioners may resist the payment of a warrant which has been wrongfully and unlawfully issued, although no appeal was ever taken

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by anyone from the order directing its issuance. This view is not in conflict with any of the former decisions of this court to which our attention has been directed.

Section 3 of article 8 of the constitution provides: "No county, city, town, township, board of education or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, for any purpose, exceeding in that year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void; provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state."

The building a courthouse, bridge or wagon road is not an ordinary expense within the meaning of the foregoing constitutional provisions. (*Bannock County v. Bunting*, 4 Idaho, 156, 37 Pac. 277; *Dunbar v. Board of Commissioners*, 5 Idaho, 407, 49 Pac. 409.) The indebtedness having been incurred for an extraordinary expense and in excess of the revenues provided for that year, and not having been authorized by a two-thirds vote of the people at an election held for that purpose, was in violation of the foregoing provision of the constitution. (*Dunbar v. Board of Commissioners*, *supra*; *Ball v. Bannock County*, 5 Idaho, 605, 51 Pac. 454.) In *Dunbar v. Board of Commissioners*, the court, speaking through Mr. Justice Quarles, said: "Under section 1762 of the Revised Statutes, a bridge cannot be built at a cost to exceed \$1,000, unless one-third of the taxpayers who are voters of the county petition therefor, but since the adoption of our constitution this provision of the statute only applies when the revenues for the fiscal year are not exceeded; for if such expenditure

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exceeds, when added to the necessary expenditures of the county for the fiscal year, the revenue for that year, then such bridge cannot be built without a two-thirds vote as provided in section 3, article 8 of the constitution."

It appears that for the year 1894 the county raised \$6,621.54 revenue available for current expense, and appellant suggests that under section 946 of the Revised Statutes, as amended by act of February 7, 1899 (Sess. Laws, 1899, p. 131), the indebtedness incurred might have been paid out of the general fund of the county. One reason why this could not have been done was that it was used up for other purposes, and another reason is that the board never availed itself of the benefits of this statute and never ordered any part of this claim paid out of the general fund. A like view was expressed in *Ada County v. Bullen Bridge Company*, *supra*, where the court said: "Again, it does not appear that any attempt was ever made by the board of commissioners to avail themselves of the provision of section 11 of the act of March 13, 1891. No warrants were ever drawn upon the general fund, nor were there to be, under the terms of the contracts. Nor was there any special or other tax levied to meet the payments stipulated for in said contracts. The appeal to section 11 of the act of March 13, 1891, seems to have been entirely an afterthought, due, we apprehend, more to the acumen of counsel than any desire on the part of the commissioners to comply with the law."

It is also argued that since the people of the county voted to issue bonds in a sufficient amount to cover all other indebtedness of the county and include these warrants, that such action amounts to a ratification and takes the place of an election as required by section 3 of article 8 of the constitution. This contention was made in *Dunbar v. Board of Commrs.*, and the court said: "It is true that an election was held to ascertain the will of the electors of Canyon county as to whether bonds should be issued 'for the purpose of funding the outstanding indebtedness of said Canyon county incurred prior to January 14, 1895, and as evidenced by the outstanding warrants of said Canyon county.' But the record does not

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show that the question of incurring the debts for building the Parma and Caldwell bridges, amounting to about \$15,000, was submitted to the electors by petition or otherwise." It is clear that there can be no ratification by a county of an act done in direct violation of the constitution. The constitution requires as a condition precedent to incurring such a liability as the one sued on, that the question should be first submitted to a vote of the people of the county and receive "the assent of two-thirds of the qualified electors thereof, voting at an election held for that purpose." The purpose of the constitution is to require the specific question submitted to the electors unaccompanied and unencumbered with any other subject or question.

The warrants sued on were not issued in conformity with the requirements of section 2006 of the Revised Statutes, which provides that: "All warrants must distinctly specify the liability for which they are drawn, and when it accrued." This statute was held mandatory by the United States circuit court of appeals in *Bingham County v. First National Bank of Ogden*, 122 Fed. 16, 58 C. C. A. 332. (See, also, *Raymond v. People*, 2 Colo. App. 329, 30 Pac. 504.)

The judgment of the lower court must be affirmed, and it is so ordered. Costs awarded to respondent.

Sullivan, J., concurs.

Stockslager, C. J., dissents.

STOCKSLAGER, C. J., Dissenting.—I cannot see my way clear to concur in the conclusion reached by my associates. The facts were stipulated and are fairly stated in the opinion, but the conclusion to be drawn from them is where I differ from the majority. As stated in the opinion, the contract was awarded to Mr. Penwell by the board of county commissioners after the clerk, on the order of the board, had advertised for bids. He completed the work, the road was accepted by the county through its legally constituted agents, and warrants were issued in compliance with the contract. No charge or even intimation of bad faith on the part of the board of

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commissioners, Mr. Penwell, or anyone else connected with the transaction or anything leading up to the final issue of the warrants. No appeal taken from any of the orders of the commissioners relative to the contract or the issue of warrants. The warrants for more than half of the original contract price were paid by the county treasurer before the legality of the remaining warrants was questioned. This, too, after Mr. Penwell had disposed of them to the appellant, who, in the ordinary acceptance of the term, had purchased in good faith and for value; then it is discovered that there may be a legal, certainly not moral, excuse for refusing to pay a debt that had been contracted for the use and benefit of the inhabitants of the county.

The county auditor of Lemhi county issued the warrants on the order of the county commissioners to Mr. Penwell in payment for work done on the road, and after it had been accepted on July 21, 1894, on the twenty-third day of July they were presented to the county treasurer for payment and indorsed by him "not paid for want of funds." In April, 1900, the county commissioners made an order finding the legal indebtedness of the county to be \$50,877.65, which included the warrants in controversy. At an election thereafter held a sufficient number of the qualified voters of the county voted in favor of issuing bonds for the redemption of the outstanding warrants. The first time the legality of those warrants was ever questioned as shown by the record was on the sixteenth day of July, 1900, when the commissioners of the county declared the warrants illegal and ordered the county treasurer not to pay them. Thus we find that lacking five days of six years, these warrants were treated as a valid subsisting debt against the county. All acts of the county commissioners are presumed to be legal until the contrary is shown, and the law provides for an appeal "from any order, decision or action of the board while acting in an official capacity—by any person aggrieved thereby or by any taxpayer of the county when any demand is allowed against the county, or when he deems any order, decision or action of the board illegal or prejudicial to the public interests." The

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legislature amended this section in 1899 (Sess. Laws 1899, p. 248), but in no way to affect the merits of this case; it only provides the time in which the appeal must be taken after the county commissioners have published a statement of their proceedings, etc. It could not affect this action, as all orders, with the single exception of the one made by the board in July, 1900, in which they declared the warrants illegal and authorized the county treasurer not to pay them, were under section 1776, *supra*. In the majority opinion it is said: "It should be observed, however, that section 1776 of the Revised Statutes, as amended February 14, 1899, applies only to persons and taxpayers and has no application to the municipality itself. The legislature never contemplated that the board of commissioners would ever want to appeal from their own action in making an order or paying a claim." Of course the statement that "the board of commissioners would never want to appeal from their own action" is literally true—if they become dissatisfied with any order made, they can rescind it; and then if the "person or taxpayer" is dissatisfied with their action there is a remedy by appeal. It is shown by the record in this case that not only the board of county commissioners were satisfied with every step taken from January 10, 1892, down to the order of July, 1900, declaring the warrants illegal, but the "persons and taxpayers" were also satisfied. Within this time the petition asking for the construction of a road was acted upon and approved January 10, 1893. On the ninth day of April, 1894, another order was made directing the clerk to advertise for bids. On May 11, 1894, the bids were opened, and the bid of O. E. Penwell was accepted. Viewers were appointed by the board of commissioners, who reported said road to have been constructed according to the contract, and on the twenty-first day of July, 1894, the report of the viewers was accepted by the board and warrants were ordered drawn in payment for said work. On the same day the auditor drew the warrants in compliance with the order of the board and delivered the same to contractor Penwell. Each and all of these orders were appealable, yet the "people and taxpayers" of the county did not

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see fit to take an appeal from any of them, with section 1776 of the Revised Statutes, as amended in 1899, enjoining upon them the duty of doing so if they were dissatisfied with any of the orders of the board of commissioners. It is apparent that the county commissioners and the "people and taxpayers" were in harmony with the former action of the board as late as January, 1900, as it is shown that two of the warrants of \$1,000 each were paid in 1899, and one for \$1,000 was paid in January, 1900. That the remedy for reviewing the action of the board of commissioners is by appeal has been repeatedly announced by this court. In *Morgan v. County Commrs. of Kootenai Co.*, 4 Idaho, 418, 39 Pac. 1118, the court sustains the theory of appellant. The syllabus says: "When order for the issue and sale of bonds has been made and entered of record by the board of county commissioners of any county, proceedings in equity to restrain the issuance and sale of such bonds in pursuance to such order will not lie, the court having no jurisdiction in equity, where there is a plain, speedy and adequate remedy at law, by appeal from the order of the board." In *Picotte v. Watt*, 3 Idaho, 447, 31 Pac. 805, the first paragraph of the syllabus says: "Where the statute provides a plain, speedy and adequate remedy it must be followed." In *Rogers v. Hays*, 3 Idaho, 597, 32 Pac. 259, the syllabus says: "Writ of review does not lie from the action of a board of county commissioners, the statute having provided a speedy and adequate remedy by appeal." In *Johnson v. Savidge*, 11 Idaho, 204, 81 Pac. 616, a decision of this court, it is said: "If the board of county commissioners has jurisdiction to create justices' precincts within the limits of an incorporated city, and does so, its action can only be reviewed by appeal." Again, in *School District No. 25 v. Rice*, 11 Idaho, 99, 81 Pac. 155, this court says: "The remedy for review of the action of a board of county commissioners in this state is by appeal from the order or act complained of."

It would seem from the authorities above cited that all orders of a board of county commissioners become final unless rescinded or appealed from within the statutory time, and the stipulation shows neither was done in this case. The ques-

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tion arises here, Could the board of county commissioners by an order declaring the warrants in question illegal, invalidate all the orders of their predecessors leading up to the issue and delivery of the warrants? The statute enjoins upon the members of the board certain duties; they may make an order and thereafter rescind it, but after orders have been made upon which contracts have been based, work performed, the work accepted, warrants issued and delivered, part paid and part passed into the hands of a third party, can they invalidate all former acts in the face of the statute that provides that all orders of the board must be appealed from by anyone dissatisfied, etc.? I say no. The county must act in good faith as well as the citizen. It has no more right to take the laboring man's earnings or the capitalist's money than any other corporation or individual. Penwell did the work; the county got the benefit; McNutt paid his money for the warrants, and now the county seeks to avoid payment on the ground that some of the orders of a former board had not complied with the strict letter of the law. An individual would not be permitted to escape liability on such a plea. Why should the county? If there was a plea of fraud in any of the transactions leading up to the issue and delivery of the warrants, the situation would be different; but it is shown that every transaction on the part of the board in letting the contract, accepting the work and issuing warrants was in the utmost good faith, and that the county received value for the warrants. Now, six years after the work is completed, to allow a board to declare the warrants invalid and refuse to pay them, does not meet with my idea of justice, and the law does not countenance injustice in any transaction. I further think these "persons and taxpayers" (and the individual members of the board of county commissioners who now seek to avoid payment, belong to one or the other, or both), ratified all former acts of the board of commissioners when they voted to bond the county for the outstanding warrants, the warrants in controversy being of the number enumerated in the list outstanding. But it is useless to discuss this question further. I think the judgment should be reversed.

Argument for Appellants.

(February 21, 1906.)

PETER LATER et al., Appellants, v. MARTHA HAYWOOD, Respondent.

[85 Pac. 494.]

PRIVILEGED COMMUNICATIONS — ATTORNEY AND CLIENT — NONSUIT ON PLAINTIFF'S EVIDENCE—SUFFICIENCY OF EVIDENCE ON MOTION FOR NONSUIT.

1. Communications which pass between one who is merely acting as a conveyancer or friendly adviser and the grantor or grantee are not privileged communications under the provisions of subdivision 2 of section 5958 of the Revised Statutes, which protects communications which pass between attorney and client in the course of professional employment.

2. On a motion by the defendant for nonsuit after the plaintiff has introduced his evidence and rested his case, the defendant must be deemed to have admitted all the facts of which there is any evidence, and all the facts which the evidence tends to prove.

3. A case should not be withdrawn from the jury on motion for nonsuit after the plaintiff has introduced his evidence, unless the conclusion from the evidence necessarily follows, as a matter of law, that no recovery could be had upon any view which could reasonably be drawn from the facts which the evidence tends to establish.

(Syllabus by the court.)

APPEAL from the District Court of the Sixth Judicial District for Fremont County. Hon. J. M. Stevens, Judge.

Plaintiffs appealed from a judgment of nonsuit. *Reversed, and new trial ordered.*

Caleb Jones, for Appellants.

A motion to make the complaint more certain, under our code, will not lie. Such an objection must be taken by demurrer. (*Naylor v. Loan etc. Co.*, 6 Idaho, 251, 55 Pac. 297; *Palmer v. Utah etc. Ry. Co.*, 2 Idaho, 315, 13 Pac. 425; *Aulbach v. Dahler et al.*, 4 Idaho, 654, 43 Pac. 322; Idaho Rev. Stats. 1887, sec. 4178.)

The relation of attorney and client must exist before communications can be deemed privileged, under section 5958 of

Argument for Respondent.

the Revised Statutes. (*Basye v. State*, 45 Neb. 261, 63 N. W. 811; *In re Monroe*, 20 N. Y. Supp. 82; *Haulenbeek v. McGibben*, 60 Hun, 26, 14 N. Y. Supp. 393; *Granger v. Warrington*, 8 Ill. 299; *Scales v. Kelley*, 70 Tenn. (2 Lea) 706; Jones on Evidence, sec. 769; 2 Rice on Evidence, sec. 2899.)

Where several persons carry on the same business together, they are presumed to be partners. (1 Jones on Evidence, sec. 48.) Partners, in a general partnership, suing as such, may prove their partnership by the testimony of a partner. (Abbott's Trial Evidence, p. 204.) The presumption is that persons acting as copartners have entered into a copartnership. (1 Rice on Evidence, 54.)

It is a general rule of law that partnership rights, and obligations of a firm continue, even after ceasing to do business, for the purpose of settling the affairs of the firm. (*Corbin v. Henry*, 36 Ind. App. 184, 74 N. E. 1096.)

No cause of action should ever be withdrawn from the jury unless the conclusion from the facts necessarily follows as a matter of law that no recovery could be had upon any view which could be reasonably drawn from the facts which the evidence tends to establish. (*Great Northern Ry. Co. v. McLaughlin*, 70 Fed. 673, 17 C. C. A. 330; *Cain v. Gold Mountain Min. Co.*, 27 Mont. 529, 71 Pac. 1004; *Nord v. Boston etc. Silver Min. Co.*, 30 Mont. 48, 75 Pac. 681; *McCabe v. Montana Cent. Ry. Co.*, 30 Mont. 232, 76 Pac. 701; *Edmisson v. Drumm-Flato Commission Co.*, 13 Okla. 440, 73 Pac. 958.)

Holden, Holden, Holden & Holden, for Respondent.

Decisions upon mere matters of practice will not be disturbed, even if erroneous, unless it is apparent that injustice will likely result from adherence thereto, or a change will not work a wrong. (*Carr, Ryder & Adams Co. v. Closser*, 27 Mont. 94, 69 Pac. 560.)

The supreme court of California has decided that an objection to the complaint for uncertainty should be made by motion, and not by demurrer. (*San Francisco Paving Co. v. Fairfield*, 134 Cal. 220, 66 Pac. 255; *City Carpet Beating Works v. Jones*, 102 Cal. 506, 36 Pac. 841.)

Statement of Facts.

The exclusion of evidence cannot be reviewed, where no offer to prove the facts sought to be elicited was made. (*Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297; *First Nat. Bank v. Oregon Pulp etc. Co.*, 42 Or. 398, 71 Pac. 971.)

When a party moves for judgment on the pleadings, he not only, for the purposes of his motion, admits the truth of all the allegations of his adversary, but must also be deemed to have admitted the untruth of all his own allegations, which have been denied by his adversary. (*Walling v. Brown*, 9 Idaho, 184, 72 Pac. 960; *United States ex rel. Search v. Choctaw etc. R. Co.*, 3 Okla. 404, 41 Pac. 729.)

When an action is brought in the name of a party shown by the proof to have no interest in the cause of action, so that to bring in the real party in interest would not amount to a joinder of another party in interest with plaintiff, but the substitution of one party for another, there is a fatal variance. (1 Spelling on New Trial and Appellate Practice, sec. 341.)

STATEMENT OF FACTS.

The plaintiffs, who are appellants in this court, commenced their action in the district court in and for Fremont county, on the eleventh day of January, 1905, praying that a certain deed made by George E. Hill, Sr., to Martha Haywood, though absolute in form, be declared to be a mortgage on the ground that such deed was given only for the purpose of securing the payment of a loan from the defendant Haywood, to Frederick R. Hays. The plaintiff also prayed that they be adjudged and decreed successors in interest of George E. Hill, Sr., and Frederick R. Hays, and that it be decreed that they are the legal owners of the property described in the deed, and that the defendant be required to convey the legal title to the plaintiffs, upon their paying the amount of the loan, with interest. It appears that the plaintiffs, Peter Later, Richard Later and Samuel S. Later, had been, for a number of years, prior to the commencement of the action, copartners, doing business under the firm name and style of Later Bros., and that prior to the commencement of the action the firm had been dissolved, and

Statement of Facts.

the business and accounts of the firm had been turned over to the Rigby Hardware, Lumber and Manufacturing Company, a corporation which had been organized by the Later Bros., to succeed to the rights and interest of the copartnership. It was also agreed and understood that any debts or accounts that could not be collected by the corporation should be turned back to the Later Bros.

About the fifteenth day of July, 1902, the plaintiffs made a contract with George E. Hill, Sr., to build a house for him on his ranch, and in the course of the business dealings agreed to take in payment for their services and materials furnished certain real property consisting of some town lots and the buildings thereon in the town of Rigby, at a consideration of \$675. The plaintiffs in the meantime had a conversation with one of their employees, Frederick R. Hays, whereby they agreed to secure for Hays the property involved in this action either by purchasing the same or by assisting him in raising the purchase price. In the course of plaintiffs' business dealings with Hays, a loan was secured through them from the defendant Martha Haywood, in the sum of \$400, for the use and benefit of Hays, the defendant making the loan on the agreement and understanding that she should receive an absolute deed to the property as security for the loan. This appears to have been agreed to by all parties interested, and a deed was made and executed by George E. Hill, Sr., in favor of the defendant Haywood, and was delivered by Hill's son to the Later Bros., and the \$400 cash was paid by the defendant to Later Bros., for the use and benefit of Hays, whereupon the deed was delivered by them to the defendant. At the time of the payment of the loan, and the receipt of the deed of conveyance, a contract was entered into, whereby the defendant agreed to reconvey the property to Frederick R. Hays, upon the payment of the amount of the loan, together with the interest thereon. At the time of this transaction there was due to Hays from the Later Bros., the sum of about \$100 for labor. The amount of the loan and the \$100 was paid to Hill on the purchase price for the property, and the Later Bros. paid Hill the difference. About two weeks thereafter, Hays executed and

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delivered to the Rigby Hardware, Lumber and Manufacturing Company, his promissory note for the sum of \$184, being the difference between the purchase price for the property, together with the amount of money which the Later Bros. had to his credit, and the purchase price paid to Hill for the property. Some months after the purchase had been made, and the loan secured, Hays executed and delivered a quitclaim deed in favor of the plaintiffs, the Later Bros., for the property in dispute. The plaintiffs introduced their evidence tending to establish the allegations of their complaint, and, after they had rested their case, the defendant moved for a nonsuit, which motion was granted.

AILSHIE, J. (After stating the facts.)—The first four assignments of error go to rulings of the court in settling the issues in the case. These were matters addressed to the discretion of the trial court, and we find no abuse of that discretion in this case. The fifth and sixth assignments are predicated on the denial of motions by plaintiff to have default entered against defendant. While the defendant was, as a matter of fact, in default, in the strict sense, it was within the power and discretion of the court to extend and enlarge the time for answering, and no injury appears to have resulted from such action.

The seventh assignment is that the court erred in sustaining defendant's objection to the admission of the evidence of J. F. Bonham. The witness was called, and, after being sworn, testified that he had resided at Rigby, and was acquainted with Later Bros., and also with the defendant; that he had talked with Mrs. Haywood in relation to the matter at issue about one year prior to the trial of the case. It was shown by the witness that he had never been admitted as an attorney in any court, and that he did not hold himself out as such, but that, on the other hand, he was a conveyancer and kind of general counselor and adviser of the people in the village of Rigby. He advised his neighbors and friends concerning business and legal transactions which arose among them. It does not appear that he had ever been employed by defendant as a legal

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adviser in this matter. It is sufficient to say that so far as the record discloses, the witness was not disqualified under subdivision 2 of section 5958 of the Revised Statutes.

The last assignment is made against the action of the court in granting a nonsuit. This action was taken under subdivision 5 of section 4354 of the Revised Statutes. A careful perusal of the record convinces us that the evidence produced by the plaintiffs was sufficient to put the defendant to her proof. The evidence, at least, tended to prove all the material allegations of the complaint. The rule requiring the evidence in such cases as the one at bar to be clear and convincing applies only to the determination of the case on the evidence after both sides have submitted their proofs, and has no application to a case where the defendant, resting on plaintiffs' proof alone, moves for nonsuit. By such a motion the defendant admits the existence of every fact which the evidence tends to prove, or which can be gathered from any reasonable view of the evidence. (*Great Northern R. R. Co. v. McLaughlin*, 70 Fed. 673, 17 C. C. A. 330; *Cane v. Gold Mountain Min. Co.*, 27 Mont. 529, 71 Pac. 1004; *Railroad Co. v. Everett*, 152 U. S. 107, 38 L. ed. 373, 14 Sup. Ct. Rep. 474; *Cravens v. Dewey*, 13 Cal. 40; *McKee v. Greene*, 31 Cal. 418; *Fenton v. Millard*, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750; *Lewis v. Lewis*, 3 Idaho, 645, 33 Pac. 38; *Edmisson v. Drumm-Flato Commission Co.*, 13 Okla. 440, 73 Pac. 958; 6 Ency. of Pl. & Pr. 441.) It is also contended that there was a fatal variance between the allegations of the complaint and the proof submitted. Respondent argues that the evidence shows that whatever claim or cause of action has been disclosed belongs to the Rigby Hardware, Lumber and Manufacturing Company, a corporation, and not to the plaintiffs. This contention rests on the fact that the Later Bros. were the incorporators of the new company, and that the corporation appears to have succeeded to all the property and rights of the Later Bros. It also appears that the copartnership known as Later Bros. was dissolved sometime prior to the commencement of this action. It was shown, however, that the accounts were turned over to the corporation only conditionally, and that such as might

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not be collected within a given time should be turned back. So far as disclosed by the record, the right of action rests in the plaintiffs, and a recovery by them will be a bar to a recovery on the same cause of action by the Rigby Hardware, Lumber and Manufacturing Company. If any assignment of the subject matter of the cause of action has ever been made—which fact does not appear—it is not shown that the defendant has ever had any notice thereof either actual or constructive. The dissolution of the partnership does not preclude the maintenance of an action for the collection of debts and liabilities due, nor from recovering property that belonged to the firm.

The judgment must be reversed, and it is so ordered, and the cause is remanded for a new trial. Costs awarded to appellants.

Sullivan, J., concurs.

STOCKSLAGER, C. J., Dissenting.—I cannot concur in the conclusion reached by my associates, for the reason that I do not believe the plaintiffs are entitled to any relief. Before a plaintiff can recover in a civil action of this character, he must show he is the real party in interest. In this case Later Bros. plead they are entitled to the relief prayed for, and if they prove anyone is entitled to an equity in the property in controversy, it is the Rigby Hardware, Lumber and Manufacturing Company. The proof shows that Later Bros. and others organized a corporation called the Rigby Hardware, Lumber and Manufacturing Company; that corporation took over all the assets of Later Bros. Later Bros. ceased to exist as a copartnership after the incorporation of the Rigby Hardware, Lumber and Manufacturing Company, and the equity, if any, in the property in controversy, passed to the Rigby Hardware, Lumber and Manufacturing Company as one of the assets of Later Bros.; the corporation is still in existence. We find a letter in the record that throws much light on the question before us.

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“Rigby, Idaho, June 21, 1904.

“Mrs. Martha Haywood, Rigby, Idaho.

“Dear Madam: Your proposition made to us through Richard Later to pay us \$140 in full for our claim against the property you hold as security for loan, being lots 5 and 6, block 2, town of Rigby, has been considered by the directors of our company and refused. We feel that this company has been as generous with you in this matter as any sane person could wish. We wish to avoid trouble and foreclosure proceedings, but in this matter you certainly cannot object to the ultimate result of such procedure. The members of our company insist on immediate action being brought to recover the amount due us, with interest, and have instructed the undersigned to notify you that unless you pay to this company before the morning train leaves for St. Anthony Friday, the 23rd inst. the sum of \$150.00 (being the proposition made to you on the 18th inst.) the said proposition will be off, and we shall go to the county seat and institute foreclosure proceedings. This proposition is final and do not expect further overtures from us, for none will be made.

“Most respectfully yours,

“THE RIGBY HARDWARE, LUMBER & MANUFACTURING COMPANY,

“Per GEORGE HILL, Jr.,

“Secretary and Treasurer.”

This letter would indicate that the business officer of this corporation believed the Rigby Hardware, Lumber and Manufacturing Company had some kind of a claim against respondent. There is no dispute about the claim referred to being the same one upon which this action is predicated. The record fails to disclose any transfer of this claim from the Rigby Hardware, Lumber and Manufacturing Company to Later Bros. after the time this letter was written and the commencement of this action. The motion for nonsuit was sustained on the ground of fatal variance between the pleadings and proofs and other grounds. I do not think there was any error in the ruling of the court in sustaining this motion, at least

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on the ground above indicated, and the judgment should be affirmed.

ON PETITION FOR REHEARING.

(March 16, 1906.)

SULLIVAN, J.—This is a petition for rehearing. The petitioner suggests that the majority of the court have treated the petitioner's motion for nonsuit as made solely upon the ground of failure of proof and not as a motion made upon the ground of fatal variance between the allegations and the proof. In that, counsel for petitioner is mistaken. It is admitted by counsel that the motion for nonsuit involved two questions: (1) Whether the defendant had been actually misled to her prejudice in maintaining her defense upon the merits because of the variance between the allegations and the proof; and (2) Were the appellants the real parties in interest? While the first point is only inferentially decided by the opinion, the court considered that matter and concluded that the variance between the allegations and proof did not mislead the appellant. Section 4225, Revised Statutes of 1887, provides that whenever it appears that the party has been so misled, the court may order the pleadings to be amended upon such terms as may be just; but it is clear to us that the variance complained of did not mislead the adverse party, and for that reason the court followed the provisions of section 4231, Revised Statutes of 1887, which provides that the court must in every stage of an action disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.

A rehearing is denied.

Ailshie, J., concurs.

Stockslager, C. J., dissents.

(February 23, 1906.)

CLORA MARKLE DAHLSTROM et al., Plaintiffs, vs. THE
PORTLAND MINING COMPANY et al., Defendants.

[85 Pac. 916.]

**WRIT OF REVIEW—WHEN ISSUES—MOTION TO QUASH—APPEAL—ORDER—
APPEALABLE ORDER.**

1. Under the provisions of section 4962 of the Revised Statutes, a writ of review will be issued upon proper application when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy.

2. Under the provisions of said section two things must appear before a writ of review will be issued: 1. That such tribunal, board or officer has exceeded its jurisdiction; and 2. That there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy.

3. Under the provisions of section 9, article 5 of the constitution, the supreme court is empowered to review, upon appeal, any decision of the district court or the judges thereof. Some orders, however, are only reviewable on an appeal from the judgment or order granting or denying a new trial.

4. The order of the court sought to be reviewed was made after judgment, and plaintiffs had an appeal therefrom.

5. Under the provisions of section 4880 of the Revised Statutes, an "order" is defined to be every direction of a court or judge made or entered in writing and not included in a judgment.

6. When it appears that the plaintiff has an appeal that is adequate from an order, a writ of review on motion will be quashed.

(Syllabus by the court.)

ORIGINAL application in this court for writ of review.
Motion to quash. *Sustained.*

John P. Gray, for A. H. Featherstone.

A writ of review does not lie where there is a remedy by appeal. (*People v. Lindsay*, 1 Idaho, 394; *Graham v. Superior Court*, 74 Cal. 217, 15 Pac. 746; *Hayes v. First Judicial Dist. Court*, 11 Mont. 225, 28 Pac. 259; *Rogers v. Hayes*, 3 Idaho, 597, 32 Pac. 259; *Noble v. Superior Court*, 109 Cal.

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523, 42 Pac. 155; *State v. District Court*, 27 Mont. 179, 70 Pac. 516; *State v. Justice Court*, 31 Mont. 258, 78 Pac. 498.)

The writ of review will not lie because the time limit for taking an appeal has expired. (*McCue v. Superior Court*, 71 Cal. 545, 12 Pac. 615; *In re Stuttmeister*, 71 Cal. 322, 12 Pac. 270; *Bennett v. Wallace*, 43 Cal. 25; *Faut v. Mason*, 47 Cal. 8.)

Certiorari will not lie to review a judgment after the expiration of the time limit for appeal, unless circumstances of an extraordinary character intervene. (*Keyes v. Marin County*, 42 Cal. 256; *Reynolds v. Superior Court*, 64 Cal. 372, 28 Pac. 121; *Smith v. Superior Court of Los Angeles*, 97 Cal. 348, 32 Pac. 322; *Ramsey v. Pettengill*, 14 Or. 207, 12 Pac. 439.)

The special order after final judgment is appealable; therefore a writ of review will not lie to review such an order of the court. (*Slavoncia Assn. v. Superior Court of Santa Clara*, 65 Cal. 500, 4 Pac. 500; *Ramsey v. Pettengill*, 14 Or. 207, 12 Pac. 439; *Hayes v. First Judicial District Court*, 11 Mont. 225, 28 Pac. 259; *Stoddard v. Superior Court*, 108 Cal. 303, 41 Pac. 278; *White v. Superior Court*, 110 Cal. 54, 42 Pac. 471; *Tucker v. Justice Court*, 120 Cal. 512, 52 Pac. 808; *Southern California Ry. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789.)

W. W. Woods, for Clara Markle Dahlstrom.

The original jurisdiction granted by the constitution to this court to issue writs of *certiorari* cannot be either divested or abridged by the legislature.

The granting of this writ is discretionary. (*Harris v. Barber*, 129 U. S. 366, 32 L. ed. 697, 9 Sup. Ct. Rep. 314.)

Since the issuing of the writ is discretionary, a motion to quash is addressed to the discretion of the court, and will be granted or denied accordingly. (4 Ency. of Pl. & Pr. 234, citing *Flourney v. Payne*, 28 Ark. 87; *Ex parte Pearce*, 44 Ark. 509; *State v. Hudson City*, 29 N. J. L. 115; *State v. Street Commrs.*, 38 N. J. L. 320; *State v. Manning*, 40 N. J. L. 461; *White v. Wager*, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60.)

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Where an inferior court or tribunal exceeds its jurisdiction, *certiorari* lies, even though there is a right of appeal. (*State ex rel. Hamilton v. Guniette*, 156 Mo. 513, 57 S. W. 281; *Hyslop v. Finch*, 99 Ill. 171.)

The remedy by *certiorari* could not be taken away without some clear legislative enactment to that effect. (*Ritter v. Kunkle*, 39 N. J. L. 259; *State v. Falkinburge*, 15 N. J. L. 320.)

Even though appeal can be taken, *certiorari* not inhibited. (*People v. Donahue*, 15 Hun, 418.)

In Georgia and Delaware it is held that appeal and *certiorari* are cumulative remedies. (*Roser v. Marlow*, R. M. Charl. (Ga.) 542; *Williams v. Buichinal*, 3 Harr. 83.)

A. G. Kerns, for Portland Mining Company.

The language, "special order made after final judgment," in the statute naming appealable orders, does not include action by a judge wholly in excess of his jurisdiction after the satisfaction of a judgment of record. The phrase means some special order of the court made after final judgment affecting the rights of the parties, plaintiffs or defendants, before the entry of satisfaction, on a motion by one of the parties, plaintiffs or defendants.

An order can only be made in a cause then pending. (Idaho Rev. Stats., sec. 4881.)

The jurisdiction of the court over the controversy and over the parties, acquired in the primary action by service of process, continued until its judgment is satisfied. (*Phelps v. Mutual etc. Ins. Co.*, 112 Fed. 453, 50 C. C. A. 339; *Freeman on Judgments*, 121, 466.)

Under a statute similar to our own, it has been held *certiorari* will lie, even in a case where an appeal is given, if the latter be ineffectual as a remedy. (*Paul v. Armstrong*, 1 Nev. 82.)

SULLIVAN, J.—This is an original application in this court for a writ of review. It is set forth in the complaint or petition for the writ that on September 2, 1895, the Portland

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Mining Company executed promissory notes aggregating \$49,338.64 to Clora Markle Dahlstrom, and notes aggregating \$39,476.26 to Alvin Markle, and secured all of said promissory notes by mortgages on property in Shoshone county, Idaho, the mortgage being given to the Markle Banking and Trust Company of Hazleton, state of Pennsylvania, as trustee; that on December 5, 1902, a judgment decreeing the foreclosure of said mortgages to satisfy the amount due thereon was duly rendered by the district court of the first judicial district of the state of Idaho, in Shoshone county; that on January 10, 1905, the said Clora Markle Dahlstrom and Alvin Markle made, executed and delivered to the said Portland Mining Company a satisfaction in writing of the said judgment and decree of foreclosure, and in consideration thereof and a stay of proceedings, the Portland Mining Company on said date executed, acknowledged and delivered to said Clora Markle Dahlstrom a confession of judgment in writing for \$49,338.64, principal, \$28,616.41, interest, \$7,795.50, attorney's fees, and \$49.55, costs, aggregating \$85,800.20, to bear interest at seven per cent from December 5, 1902, and at the same time delivered a like confession of judgment to Alvin Markle for \$39,476.26, principal; \$22,896.23, interest, \$6,237.24, attorney's fees, and \$10.30, costs, aggregating \$68,620.03, to bear interest at seven per cent from December 5, 1902; that on April 11, 1905, said satisfaction of judgment was filed in said district court and the decree of foreclosure was satisfied of record, and on the same date several confessions of judgment were duly and regularly filed and entered of record in said court; that on July 1, 1905, Honorable R. T. Morgan, judge of the said district court, acting wholly without jurisdiction and in excess of the jurisdiction of the said district court, without service of process on the part of the Portland Mining Company or the Markle Banking and Trust Company, or Clora Markle Dahlstrom or Alvin Markle, and upon a petition by one Albert H. Featherstone, who was not a party to said suit, made a pretended order vacating and setting aside the satisfaction of decree of foreclosure of December 5, 1902, and at the same time and

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with a lack of jurisdiction, pretended to make and did make and sign as such judge and cause to be entered on the records of said court, a pretended order decreeing said Featherstone to be the equitable assignee of the decree of foreclosure of December 5, 1902, to the extent of \$5,987.24, with interest at seven per cent from December 5, 1902, and declared the claim of the said Featherstone a lien upon said judgment and directed the sale of the mortgaged premises to satisfy said claim; that on September 20, 1905, execution issued out of the said district court on said pretended order of July 1, 1905, and the mortgaged premises was advertised for sale by the sheriff to satisfy said claim of Featherstone in preference to the remaining portions of the said decree; that the sole consideration for the confessions of judgment aforesaid was the satisfaction of the decree of foreclosure and a stay of proceedings until the expiration of an existing obligation to purchase said premises or the exercise of such obligation, for a sufficient sum to pay off said confessions of judgment, and said confessions of judgment remain unsatisfied and a lien on the former mortgaged premises; that said action of said judge has clouded and confused the liens against the mortgaged premises, and impairs the property rights and contract obligations of these petitioners, and purports to give an unlawful and unjust preferred lien against said premises, and that petitioners have no appeal or other plain, speedy or adequate remedy in the premises.

Upon the foregoing allegations a writ of review was issued. A return to said writ was made by the defendants which sets up the pleadings in the original action of Clara Markle Dahlstrom and Alvin Markle, plaintiffs, against the Portland Mining Company, and the Markle Banking and Trust Company, defendants, and all of the proceedings had in said action in said district court, and also all proceedings connected with said case of which the plaintiffs in this proceeding complain.

Counsel on behalf of A. H. Featherstone and the judge of the said district court file their motion herein to quash the said writ of review and to dismiss the petition or complaint

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on three grounds: 1. That the plaintiffs and petitioners had no standing herein, for the reason that they have a plain, speedy, adequate and complete remedy at law by appeal; 2. For the reason that a writ of review will not lie to review a judgment after the expiration of the time limit for an appeal, unless circumstances of an extraordinary character intervene, none of which have been shown to exist by the petition; 3. For the reason that the order sought to be reviewed is a special order made after final judgment, and is appealable under the Revised Statutes of the state of Idaho and the constitution of this state; 4. For the reason that it appears that the court had jurisdiction of the subject matter of the suit and of the parties, and therefore jurisdiction to make and enter the order sought to be reviewed.

Under the provisions of section 4962 of the Revised Statutes, a writ of review may be granted by any court, except a probate or justice's court, when an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy. It will be observed that two things must be shown to exist before a writ of review will be issued. The first is that an inferior tribunal, board or officer exercising judicial functions has exceeded its jurisdiction; and, second, that there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy. If, in the case at bar, the petitioners had an appeal, the motion to quash the writ must be granted.

Under the provisions of section 9 of article 5 of the constitution of Idaho, the supreme court is empowered to review, upon appeal, any decision of the district courts or the judges thereof. Then conceding that the court had no jurisdiction to make the order complained of, and the petitioners having the right to appeal, they are not entitled to have the order of the court or judge reviewed upon writ of *certiorari*.

Section 4880 defines an "order" as every direction of a court or judge made or entered in writing and not included in a judgment. It appears that at the time of hearing the

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motion for said order Clara Markle Dahlstrom appeared specially by her attorneys, and the Portland Mining Company appeared specially by its attorney, and resisted the said motion. After that hearing the court made the order complained of, and the petitioners had the right to an appeal, which we think would have been an adequate remedy in the matter. Said order was made on the 1st of July, 1905, and an appeal therefrom could have been heard at the October, 1905, term of this court. The petition for the writ of review was filed in this court on October 3, 1905, some days after the time for taking such appeal had expired. The court does not intend to pass upon the merits of the main controversy in this matter. We simply hold that the petitioners had the right to appeal from the order complained of and should have taken an appeal. The statute provides that appeals from certain orders must be taken within sixty days, while the review of certain other orders may be had on an appeal from the judgment or from the order granting or refusing a new trial. It was not intended that a separate appeal should be taken from every order made in the trial of a case, but it was intended to give the supreme court jurisdiction to review every decision of the district court. All orders that could as well be reviewed on an appeal from the judgment or from the order granting or refusing a new trial as on separate appeals, should be reviewed on appeals from the judgment or the order granting or denying a new trial. It appears from the record before us that the time has expired for an appeal from the order of July 1, 1905, but it appears that a decree of judgment was entered after said order was made. An appeal may be taken from that judgment within a year after the entry thereof. The motion to quash the writ is granted, with costs in favor of A. H. Featherstone.

Stockslager, C. J., and Ailshie, J., concur.

Argument for Appellant.

(February 26, 1906.)

THE WESTERN LOAN AND SAVINGS COMPANY, a
Corporation, Appellant, v. C. S. SMITH, NELLIE J.
SMITH and JOHN W. GIVENS, Respondents.

[85 Pac. 1084.]

**AFFIDAVIT TO SET ASIDE DEFAULT JUDGMENT—MISTAKE—INADVERTENCE,
SURPRISE OR EXCUSABLE NEGLECT.**

1. Affidavits on motion to set aside a default judgment under the provisions of section 4229 of the Revised Statutes must show that the default occurred through mistake, inadvertence, surprise or excusable neglect.

2. An application to set aside and vacate a default judgment is addressed to the sound discretion of the court to which the application is made, and unless it appear that such discretion has been abused, the order will not be disturbed on appeal.

3. The showing made in this case reviewed and held insufficient to authorize the setting aside a default judgment.

(Syllabus by the court.)

APPEAL from the District Court of the Sixth Judicial District for Bingham County. Hon. J. M. Stevens, Judge.

Plaintiff moved on the affidavit of the president and manager of plaintiff corporation, and the pleadings and files in the action to set aside a default judgment. Motion was denied and plaintiff appealed. *Affirmed.*

Hansbrough & Adamson, for Appellant.

Where the allegations of an answer, pleaded again in the affirmative form, are in effect only a denial of the allegations of the complaint, they do not constitute a cross-complaint. (*Goddard v. Fulton*, 21 Cal. 430; *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747.) A cross-complaint is improper and should be disregarded where the same matter is set up in it that is already pleaded in the answer. (*Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156, 22 Pac. 210; *Akin v. Cassidy*, 105 Ill. 22; *Baker v. Oil Traction Co.*, 7 W. Va. 454; *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456.)

Matters which are proper as a defense will not be turned into a counterclaim or cross-complaint merely by a prayer for

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affirmative relief. (*Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747; *Doyle v. Franklin*, 40 Cal. 107.) There was no new matter set up in either the answer or alleged cross-complaint against plaintiff, and if any new matter was set up in the answer, it is deemed denied by plaintiff. (Rev. Stats. 1887, sec. 4217.)

If the defendant has a cause of cross-complaint and wishes affirmative relief, his pleadings should show distinctly that it was intended as a cross-complaint; if it commences as follows: "And for a further and separate answer and defense to said action defendant avers by way of cross-complaint," the pleadings will be construed against the pleader and as against him it will be treated as an answer merely. (*Goldman v. Bashore*, 80 Cal. 146, 22 Pac. 82; *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747; *Meeker v. Dalton*, 75 Cal. 154, 16 Pac. 764; 5 Ency. of Pl. & Pr. 680.)

A cross-complaint, like a complaint, must in itself state all the requisite facts to entitle the defendant to affirmative relief, and defects in it cannot be cured by the averments of any of the other pleadings. (*Kreichbaum v. Melton*, 49 Cal. 50; *Collins v. Bartlett*, 44 Cal. 371; *Coulthurst v. Coulthurst*, 58 Cal. 239.)

STOCKSLAGER, C. J.—Plaintiff commenced this action in the district court of Bingham county against C. S. Smith and Nellie J. Smith to foreclose a mortgage it had against these defendants. The complaint alleges that on the twenty-eighth day of February, 1891, defendants Smith executed their promissory note for the sum of \$1,000, payable on or before five years after date with interest at the rate of nine per cent per annum payable monthly in advance, to the Western Building and Loan Association, a corporation, under the laws of Idaho. That on the same day defendants executed their mortgage to secure the payment of the note above referred to; that said mortgage was duly acknowledged, delivered to said corporation and filed for record. That on the tenth day of October, 1894, said Western Building and Loan Association assigned, transferred and delivered all its right, title and interest in and to the note and mortgage to the Western Loan and Sav-

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ings Company, which company is now the owner and holder of said note and mortgage. That on or about the second day of January, 1900, an accounting and settlement was had between plaintiff and C. S. Smith, and there was found to be a balance due on said note of \$1,104.80, which said amount Smith then and there agreed in writing to pay; that no part of said sum or interest has ever been paid since said date; that on or about the twenty-first day of August, 1894, Charles S. and Nellie J. Smith made and delivered to one Charles Bunting their certain promissory note for \$3,241.60, and to secure the payment thereof executed and delivered to said Bunting a certain mortgage of same date, duly acknowledged, recorded, etc. The property described in the mortgage is lots 1, 2, 3, 4 and 5, block 52, Danilson & Shilling's addition to Blackfoot, Idaho, being the same property described in the mortgage marked plaintiff's exhibit "A" and made a part of the complaint. The ninth allegation of the complaint is that the said mortgage given to Bunting is subsequent and inferior to the mortgage given by the defendants, C. S. Smith and Nellie J. Smith, to the Western Building and Loan Association. Then follows an allegation that plaintiff is informed and believes, and therefore alleges, that the defendant John W. Givens is the assignee of the Bunting note and mortgage, and claims to have some interest or claim upon said premises, or some part thereof, by virtue of being the owner and holder of said mortgage, which is subsequent to the mortgage of plaintiffs. Then follows prayer "for the sum of \$1,404.80, with interest from January 2, 1900, at nine per cent per annum, . . . that the defendants and all persons claiming under them subsequent to the execution of the mortgage given by said C. S. Smith and Nellie J. Smith to the Western Building and Loan Association upon said premises . . . may be barred and foreclosed of all rights, claims or equity of redemption in said premises," etc. To this complaint a demurrer was filed by counsel for defendant John W. Givens, to wit:

"1. That the complaint of the plaintiff herein does not state facts sufficient to constitute a cause of action against

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the defendant. 2. That said action is barred by the provisions of section 4052 of the Revised Statutes of Idaho, 1887." If the court ever passed upon this demurrer the record fails to disclose the order. On the twenty-fifth day of April, 1905, defendant Givens filed what is termed answer and cross-complaint. In the answer, alleging as a reason that he has not sufficient knowledge, information or belief to answer positively, he denies all the allegations from 1 to 7; admits the seventh allegation which refers to the execution and delivery by the defendants Smith to Charles Bunting of the mortgage described in the complaint. Denies the eighth allegation, which is that the Bunting mortgage is inferior to the one sued on by plaintiff; admits the allegations of the Bunting mortgage with note to defendant Givens, and avers that he is now the lawful owner and holder thereof; that the principal sum has not been paid, and no interest with the exception of \$242.45 paid by C. S. Smith to defendant Givens on February 20, 1899, and another payment made on said interest by said Smith on the thirtieth day of April, 1903.

The fourth allegation of the answer is that the defendant is informed and believes, and upon such information and belief alleges, that the plaintiff's action herein is barred by the provisions of section 4052 of the Revised Statutes of Idaho of 1887. And further answering by way of cross-complaint against the plaintiff and each and all of the defendants hereto other than this cross-complaint, the said John Givens alleges as follows, to wit: 1. Sets up the execution and delivery of the note by defendants Smith to Bunting and a copy thereof; 2. The execution and delivery of the mortgage to secure the note; 3. The assignment of the note and mortgage to Givens; 4. The payment of certain interest on the note by C. S. Smith and the amount he claims to be due on the note; 5. That he is the lawful owner and holder and entitled to payment, etc.; 6. That plaintiff has, or claims to have, interest in or claim upon said premises, or some part thereof, as mortgagee or otherwise, and refers to some contract or claim held by Charles A. Warner, deceased, by virtue of a trust deed executed and delivered by defendants Smith to said Warner for the pay-

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ment of certain debts, but said interest or claim of said Warner is subsequent to and subject to the lien of cross-complainant's mortgage. Seventh only refers to the power of sale and application of the proceeds in case of default in payment, etc., and then follows prayer that cross-complainant may have judgment for \$3,241.60, with interest at one per cent per month from the twenty-first day of August, 1894, and usual prayer for general relief.

Counsel for plaintiffs demur to this answer and cross-complaint, to wit: "Comes now the plaintiff in the above-entitled action and demurs to the answer filed by the defendants C. S. Smith, Nellie J. Smith and John W. Givens, and for grounds of demurrer allege as follows: That neither of said answers state facts sufficient to constitute a defense or action against this plaintiff." If the court ever ruled upon this demurrer the record is silent as to the order.

The next step taken as shown by the record was what is termed "Reply to answer and pretended cross-complaint," which was filed July 3, 1905; the first paragraph is: "That as respects the allegations contained in paragraphs 7 and 9 of the answer of said defendant Givens, wherein said defendant alleges ownership of a certain note and mortgage executed by his codefendants, C. S. Smith and Nellie J. Smith, to C. Bunting & Co., and alleges that said note and mortgage is superior to the note and mortgage of the plaintiff; the plaintiff answering upon information and belief that the note and mortgage referred to and described in said paragraph is barred by the provisions of section 4052 of the Revised Statutes of Idaho for 1887, and that the defendant's alleged cause of action thereon, as against this plaintiff, is barred by the provisions of section 4052 of the Revised Statutes of Idaho for 1887." The plaintiff denies that the plaintiff's action is barred by the provisions of section 4052 of the Revised Statutes of Idaho for 1887. And further replying to the said answer and pretended cross-complaint of the said defendant, the plaintiff admits and alleges as follows:

"1. Plaintiff has no knowledge, information or belief sufficient to enable it to reply to the allegations of paragraph

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2 of said pretended cross-complaint positively, and basing its denial upon that ground, it denies each and all of the allegations contained in the said second paragraph, except as such allegations are admitted by the allegations of the complaint herein." Paragraphs 3, 4, 5 and 7 are denied on the same grounds for the same reasons and practically in the same language as is used in the denial of paragraphs 1 and 2.

Respecting the sixth paragraph in the cross-complaint, plaintiff says: "Respecting the allegations of the sixth paragraph of the said pretended cross-complaint, the plaintiff admits that it claims to have some interest in, or claim upon, said premises described in the said pretended cross-complaint as mortgagee; but denies that said interest and claim is inferior to, or subject to, the lien of the said cross-complainant's mortgage, but alleges that it is superior to the cross-complainant's mortgage, and further alleges that the said claim and interest of the plaintiff is described and set forth in the plaintiff's complaint herein, which is hereby referred to and made a part of this reply. That as regards the other matters and things alleged in said paragraph, the plaintiff has no knowledge, information or belief concerning them, and basing its denial upon that ground, denies each and all of the other allegations in said paragraph contained."

The eighth is: "Plaintiff alleges upon information and belief that the said pretended cause of action alleged by the cross-complainant against his said codefendants, C. S. Smith and Nellie J. Smith, and particularly as against the said plaintiff, is barred by the provisions of section 4052 of the Revised Statutes of Idaho for 1887."

On the eighth day of May, 1905, the clerk made the following entry: "In this action, the plaintiff having been served with copy of the cross-complaint of defendant John W. Givens, and having failed to answer or demur to said cross-complaint, and the legal time for answer having expired, the default of the plaintiff in the premises is hereby entered according to law."

On the ninth day of June, 1905, a judgment was rendered in favor of cross-complainant, John W. Givens, for amount

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prayed for in his cross-complaint, ordering the property described in the complaint to be sold by the sheriff of Bingham County, and the proceeds arising therefrom to be applied on the judgment of defendant Givens, and further adjudging the claim of plaintiff barred by the statute of limitations as to the claim of cross-complainant Givens. On the same day the judgment was filed with the clerk of the court. Counsel for plaintiff moved to set aside the default entered by the clerk, and to vacate and set aside the judgment of the court entered thereunder: I. "That the purported cross-complaint is not actually or in effect a cross-complaint as against plaintiff in the following particulars, to wit: a. That there is no demand or cause of action existing or shown to exist as appears from the alleged cross-complaint in favor of the said J. W. Givens and against the said Western Loan and Savings Company; b. That the matters and things alleged in the said pretended cross-complaint as against this plaintiff constitute merely a denial of the allegations contained in the plaintiff's complaint, and as such amount merely to an answer to the complaint, and to such answer the plaintiff has made an appearance by demurrer; c. That as respects the said plaintiff, the only claim made in the said pretended cross-complaint is that the mortgage of said Givens is superior to the mortgage of the plaintiff; and that this contention is made with equal force in the answer of said Givens to the complaint, and that this question is the sole issue between the plaintiff and the said J. W. Givens, and the plaintiff is nowhere in default upon said issue, but denied under oath in its complaint; that said Givens holds a superior lien to the plaintiff's lien, and has alleged under oath therein that its lien is superior; and the said Givens in his answer has denied said allegations of the complaint, and the said allegations substantially bring the parties to issue upon that point; d. That, said pretended cross-complaint states no grounds for affirmative relief against the said plaintiff upon which judgment against the plaintiff could be based, and the said cross-complaint does not pray for any relief against the said plaintiff, and is not entitled to any relief against the said plaintiff either upon default of the plaintiff or otherwise.

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“II. That the said Givens was not legally entitled to enter the default of the plaintiff on the said cross-complaint for the following reasons: a. That the said pretended cross-complaint is contained in an instrument entitled, ‘Answer and Cross-complaint’ and is therein set up by way of and as part of the answer as is shown by its first paragraph, and the said plaintiff has duly appeared and plead to said answer by filing a demurrer thereto; b. That the plaintiff appeared in said action by filing the original complaint and by filing a demurrer to the answer of said Givens, notwithstanding which the default of the plaintiff was entered by the clerk without giving the plaintiff any notice as required by law.

“III. That if said pretended cross-complaint is a valid and subsisting cross-complaint against the plaintiff, the plaintiff’s failure to demur or answer to the same by express reference, is due to mistake, accident, surprise, inadvertence and excusable neglect, as follows, to wit: That as shown by the complaint the plaintiff holds the first and superior lien upon the premises described therein, and that the mortgage of J. W. Givens is inferior to that of plaintiff. That it was to determine this point only that said J. W. Givens was made a party to this action. That the answer and pretended cross-complaint of said Givens alleges no facts which controvert this contention of plaintiff and that it never was, and is not now, the intention of plaintiff to abandon this contention. That when the answer and cross-complaint of said Givens was served upon plaintiff’s attorney, H. K. Linger, the said attorney, through mistake and accident, overlooked the fact that that cross-complaint was directed against the plaintiff. He supposed that the answer was directed against the plaintiff, and that the cross-complaint was directed against the defendants only, C. S. Smith and Nellie J. Smith. That on this account the plaintiff, through its attorney, interposed a pleading, to wit, a demurrer to the answer only, but intended by the said pleading to demur to all matters alleged by the said J. W. Givens against the plaintiff in the said answer and cross-complaint.

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“IV. That the said plaintiff has a substantial defense upon the merits to any claim made by the said defendant, J. W. Givens, in the said cross-complaint.”

This motion is supported by the affidavit of P. W. Madson, president and manager of plaintiff corporation after stating that the plaintiff is the owner and holder of the note described in the complaint; that it is the first lien on the premises described in plaintiff's mortgage, and superior to the lien of defendant Given's mortgage set up in his cross-complaint, and as a reason why the default of plaintiff should be vacated and the judgment entered in favor of Givens vacated, says: “That the attorneys in the above-entitled action were C. S. Price of Salt Lake and H. K. Linger of Idaho Falls, Idaho. That the answer and cross-complaint of the defendant J. W. Givens was served upon H. K. Linger, who mailed the same to C. S. Price of Salt Lake City. That said C. S. Price directed H. K. Linger to file a demurrer to the said answer. That the said H. K. Linger, upon receipt of said letter, drafted a demurrer to the said answer and filed the same. That at said time he was under the impression that he was pleading to the whole of the pleadings filed by J. W. Givens. That he did not have the answer and cross-complaint before him at the time, and his recollection was that simply an answer was filed as to the said plaintiff, and for that reason his demurrer ran to the answer simply. That it was the proposed intention of said Price and said Linger and the said plaintiff to demur to both the answer and to said cross-complaint, and that it was by reason of the foregoing accident and mistake that the cross-complaint was not expressly mentioned in said demurrer.”

In the order overruling this motion it was shown that H. K. Linger, G. H. Hansbrough and James Ingebretsen appeared for the plaintiff in the argument of the motion. On the first day of July, 1905, the motion was overruled. This is practically a complete record of this case, and is given in order that the facts just as they were before the trial court may be understood.

The application to vacate and set aside the default entered by the clerk and also the judgment entered thereafter was

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within the sound, legal discretion of the trial court, and unless it is shown that there has been an unwarranted exercise of that discretion, this court will not disturb the order and judgment. It must be borne in mind that the trial court has so many opportunities in the proceedings in the lower court to know and understand the real situation of each case there pending. We know nothing of the conditions only as they may be made to appear upon paper, and many things transpire which furnish the lower court light that cannot be brought to our attention. It is for this reason that the trial courts have been given large discretionary power over the proceedings in those courts, and is the foundation for the almost, if not quite, universal rule that appellate courts will not interfere with the discretionary orders governing the proceedings and conduct of the business of the lower courts. It is urged by learned counsel for appellant that there is apparent from the record a clear abuse of discretion in refusing to vacate the order of the clerk in entering the default of plaintiff, and in ordering judgment for cross-complainant Givens for the amount found due on his note and mortgage as shown by his answer and cross-complaint. It is shown by the complaint that plaintiff recognized that Givens had, or pretended to have, some kind of a claim adverse to plaintiff's interest in the property in controversy, otherwise it would not have made him a defendant, and thereby required him to come in and set out by proper pleadings whatever claim he might have. After such service on Givens it was necessary for him to plead his claim in this action or his right would be barred by the statute. He could not do so by answer, neither could he plead by counterclaim. He could only deny the superiority of plaintiff's claim by answer and plead priority of his by cross-complaint. The statute of this state makes a distinction between a counterclaim and a cross-complaint. If plaintiff had commenced its action against Givens, alleging that he was indebted to it in a given amount of money due on a note and mortgage, he might meet the issue by answer alone, or if he desired to show that in the settlement

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of their differences there was money due him not shown by the complaint, then he could show that fact by counterclaim. If, as in the case at bar, Givens does not claim anything from the plaintiff, but does claim that the same property plaintiff is attempting to subject to its mortgage is subject to a prior lien by mortgage of which he is the assignee, then he must answer denying the superiority of plaintiff's lien and set his out by way of cross-complaint. This being the law in this state, *Allen v. Breusing*, 32 Ill. 505, *Parker v. Cochrane*, 11 Colo. 363, 18 Pac. 209, *Rood v. Taft*, 94 Wis. 380, 69 N. W. 183, *Gunn v. Madigon*, 28 Wis. 158, *Aqua Pura Co. v. Mayor*, 10 N. Mex. 6, 60 Pac. 208, 50 L. R. A. 224, do not apply, as they all deal with counterclaims, and correctly state the law as we understand applicable to counterclaims in the states referred to, and would be good authority in this state were we dealing with a counterclaim. For a further discussion of cross-complaint and counterclaim, see *Hunter v. Porter*, 10 Idaho, 72, 86, 77 Pac. 434. It is urged that the cross-complaint does not set out facts entitling Givens to affirmative relief, and that there was no prayer for specific relief. We cannot agree with this contention. It stated the facts leading up to the assignment of the note and mortgage to cross-complainant; that it is a superior lien to that of plaintiff as shown by the complaint; and the answer puts in issue the bar of the statute of limitations. The prayer is specific as to amount, and asks that he may have such "other and further relief in the premises as to this court may seem meet and agreeable to equity." We think the cross-complaint fully apprised the plaintiff that Givens was seeking thereby to contest the superiority of his lien over that of the plaintiff, and that it became the duty of appellant to meet the issue by an answer to this cross-complaint. We also think the prayer of the cross-complaint was sufficient to authorize the court in rendering the judgment as shown by the record, unless the adjudication as shown by the judgment that the action of plaintiff was barred by the statute of limitations as to the claim of cross-complainant was unauthorized by

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the pleadings as they stood at the time of the rendition of the judgment.

Again, as to the discretion of the court, or its abuse thereof, as shown by the record, there is but one affidavit filed in support of the motion to set aside the default and judgment. Mr. P. W. Madson, the president and manager of plaintiff corporation, attempts to enlighten the court upon the course pursued by his counsel, Mr. Price of Salt Lake and Mr. Linger of Idaho Falls, when they received the answer and cross-complaint filed by cross-complainant Givens. It is urged that from this affidavit, together with the facts shown by the record, the court should have granted the motion of appellant and relieved it of the default entered by the clerk and the judgment on such default. We are of the opinion there is enough stated in the motion, if supported by sufficient affidavits or some good reason shown why they could not be procured, to have warranted this court in saying that a refusal to grant relief would have been an abuse of legal discretion. There is no showing why the affidavit of Attorney Price of Salt Lake and Mr. Linger of Idaho Falls were not filed in support of this motion; they were the parties of all others who could have enlightened the court upon the reasons why the demurrer did not run against the cross-complaint as well as the answer, and if there was any reasonable excuse for such inadvertence, mistake or neglect, they could have so stated in an affidavit. If such showing had been made it is possible, and even probable, that the learned judge of the lower court would have granted the relief demanded by the motion. It was shown by the judgment or order overruling the motion that Mr. Linger was present and participated in the argument of the motion. We cannot understand why Mr. Linger did not supply the record with his affidavit stating the facts as stated in the affidavit of the president of plaintiff. He certainly knew the real facts so far as he is connected with them in the affidavit filed by Mr. Madson better than anyone else, and hence was better prepared to convince the court by his affidavit that plaintiff was entitled to relief on the grounds of mis-

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take, inadvertence, surprise and excusable neglect on his part or on the part of his associate, Mr. Price, than anyone else. He might have supported his affidavit by one from Mr. Price. If either or both of their affidavits had been filed, it would perhaps have had more weight in the lower court and certainly in this court, than the affidavit upon which appellant relies.

This court in a very recent case entitled *D. Holzeman & Co. et al. v. Wm. Henneberry*, 11 Idaho, 428, 83 Pac. 497, discussed the discretion of the trial court in setting aside or refusing to set aside a default judgment. Mr. Justice Ailshie said:

“It is a well-established principle that the granting or refusing an order of this kind rests in the sound legal discretion of the court to which the application is made, and that unless it appears that such discretion has been abused, the order will not be disturbed on appeal”; citing *Bailey v. Taaffe*, 29 Cal. 422, note in 58 Am. Dec. 392; *Holland Bank v. Lieutallen*, 6 Idaho, 127, 53 Pac. 398.

As to the merits of the respective parties to this action, we express no opinion as plaintiff is entitled to a hearing on his complaint, and the answer filed by cross-complainant Givens. Neither do we express an opinion as to the bar of the statute of limitations which each of the contesting parties seeks to invoke against the other. We find no error in the record and the judgment is affirmed. Costs to respondent.

Ailshie, J., and Sullivan, J., concur.

ON PETITION FOR REHEARING.

(May 26, 1906.)

SULLIVAN, J.—A petition for rehearing has been filed in this case, and one point of contention therein is that there was no cross-complaint filed in the case. We are unable to agree with their contention. The answer is entitled, “Answer and Cross-complaint.” While the answer and cross-complaint is contained in one instrument, we find the following in the tenth paragraph of the complaint; “And further

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answering by way of cross-complaint against the plaintiff and each and all of the defendants hereto, the said John W. Givens alleges as follows, to wit." Then follows a statement of a cause of action arising on a promissory note given by the other defendants, Smith and wife, for the sum of \$3,241.60, and secured by mortgage on at least a part of the real estate described in the complaint; and said defendant Givens in said cross-complaint prays for judgment against the defendants Smith and wife for said sum and the foreclosure of his mortgage, and that the defendants and all persons claiming under them or either of them may be barred and foreclosed of all rights or equity of redemption in said premises or any part thereof.

While it may not be a good practice to embody in the same instrument an answer and a cross-complaint, we know of no provision of the statute prohibiting that method of pleading, and it is clear to us that a cross-complaint is pleaded in this action which was not answered.

The next contention of counsel in the petition for a rehearing is that the judgment could not be sustained for the reason that it was not properly entered, in that it was not a judgment rendered during the trial of the main cause, but a separate and distinct judgment rendered after the default of the plaintiff had been entered for not answering the cross-complaint. While it might have been better to have entered a judgment covering the entire case made by the complaint, answer and cross-complaint, we know of no reason why a defendant who files a cross-complaint and asks therein distinct and separate relief should not be entitled to a judgment in his favor on cross-complaint, provided the plaintiff fails to answer the cross-complaint. The plaintiff no doubt has a right to have a judgment entered in the main action, and the trial court has the authority to enter such judgment as may be right in the premises.

For the reasons above stated, a rehearing is denied.

Stockslager, C. J., and Ailshie, J., concur.

Points Decided.

(February 27, 1906.)

**AMBERGRIS MINING COMPANY, Appellant, v. HARRY
L. DAY et al., Respondents.**

[85 Pac. 109.]

MINING LAW—ADVERSE SUIT—EVIDENCE OF MINERAL DEPOSIT—COMPARISON WITH CONTIGUOUS CLAIM—EXAMINATION OF CLAIM—PROOF OF MINERAL DISCOVERY.

1. Evidence of the indications miners had successfully followed in the same district and on contiguous ground in attempting to find a lode or mineral deposit is admissible in determining as to whether or not a valid mineral discovery has been made by one who attempted to locate a lode claim on similar indications and showing upon adjacent ground.

2. It is incompatible with the spirit of judicial inquiry to allow a litigant to introduce, for comparison, evidence of indications and conditions found on a particular mining property which led up to a rich ore body over which he has absolute control, and from which he may exclude every other person, unless such litigant permit his adversary to examine and inspect such property for the purpose of introducing rebuttal evidence if he so desires; and where such evidence is admitted and examination of the property is denied the adverse party, a new trial will be granted.

3. As between a prior and subsequent locator of the same ground as a lode claim, the courts will view the evidence tending to establish the senior locator's discovery in the most favorable light such evidence will reasonably justify.

(Syllabus by the court.)

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. Ralph T. Morgan, Judge.

Suit by plaintiff in support of an adverse claim to certain mining ground in conflict between the Anna and Ambergris lode claims. Judgment for defendants. Plaintiff moved for a new trial, which motion was denied, whereupon plaintiff appealed from both the judgment and the order. *Reversed, and new trial ordered.*

Argument for Appellant.

Albert Allen and John P. Gray, for Appellant.

The ground within the Anna as staked and marked would not be open to location, providing the discovery was sufficient upon which to base a valid location, until the 19th of October, 1901. The discovery of the Ambergris was made on the 4th of October, but as against the Anna would date from the 25th of October, the day when the location notice was posted upon the claim. This is not in contravention of the decision of the supreme court of the United States in *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, but comes within the rule as announced by Judge Moody in *Caledonia Gold Min. Co. v. Noonin*, 3 Dak. 189, 14 N. W. 426.

There was no valid discovery even if respondents' testimony was true. (*Doe v. Waterloo Min. Co.*, 54 Fed. 935, 82 Fed. 45; *Mt. Diablo etc. Min. Co. v. Callison*, 5 Saw. 439, Fed. Cas. No. 9886.)

Evidence as to what sort of indications other miners would follow in attempting to find lode is admissible, not as stating the opinion of third parties, but as stating the value of the indications in the mining community. (*Harrington v. Chambers*, 3 Utah, 94, 1 Pac. 362; *Chambers v. Harrington*, 111 U. S. 350, 28 L. ed. 452, 4 Sup. Ct. Rep. 428.)

A location can only be made upon the actual discovery of the vein or lode. (*King v. Amy etc. Min. Co.*, 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510; *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019; *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 671; *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560.)

There is a material difference between a discoverer being willing to spend his time and money in exploiting the ground and being justified in doing so. (Lindley on Mines, 2d ed., p. 609; *Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49.)

Where it is clear from the evidence that no valid location of the plaintiff's claim is made on the ground as found by the trial court, the decree in favor of plaintiff must be

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reversed and decree for the defendant ordered. (*Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1020.)

M. A. Folsom and W. E. Borah, for Respondents.

The law does not require any particular degree of richness in order to support a quartz claim location. It only requires that there shall be sufficient indications to justify a reasonably prudent person in spending his time and money in its development. (*Muldrick v. Brown*, 37 Or. 185, 61 Pac. 428.)

Under the requirements of the law, a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following it with the expectation of finding ore. (*Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98; *Hays v. Lavagnino*, 17 Utah, 185, 53 Pac. 1029.)

When the locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in spending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor or assays high or low, with his qualification: That the definition of a lode must always have such reference to the formation and peculiar characteristics of the ore district in which the lode or vein is found. (*Migeon v. Montana Cent. Ry. Co.*, 77 Fed. 254, 23 C. C. A. 156; *Iron etc. Min. Co. v. M. & S. G. S. M. Co.*, 143 U. S. 394, 36 L. ed. 201, 12 Sup. Ct. Rep. 543; *Book v. Justice Min. Co.*, 58 Fed. 120; *McShane v. Kenkle*, 18 Mont. 208, 56 Am. St. Rep. 578, 44 Pac. 979, 33 L. R. A. 851.)

Where there are found seams or veins of mineral matter which had induced other miners to locate claims in the same district, it would be sufficient to constitute a location. (*Shoshone Min. Co. v. Rutter*, 87 Fed. 801, 31 C. C. A. 223; 1 Lindley on Mines, 2d ed., sec. 336; 1 Snyder on Mines, sec. 345; *Iron S. M. Co. v. Cheesman*, 116 U. S. 529, 29 L. ed. 712,

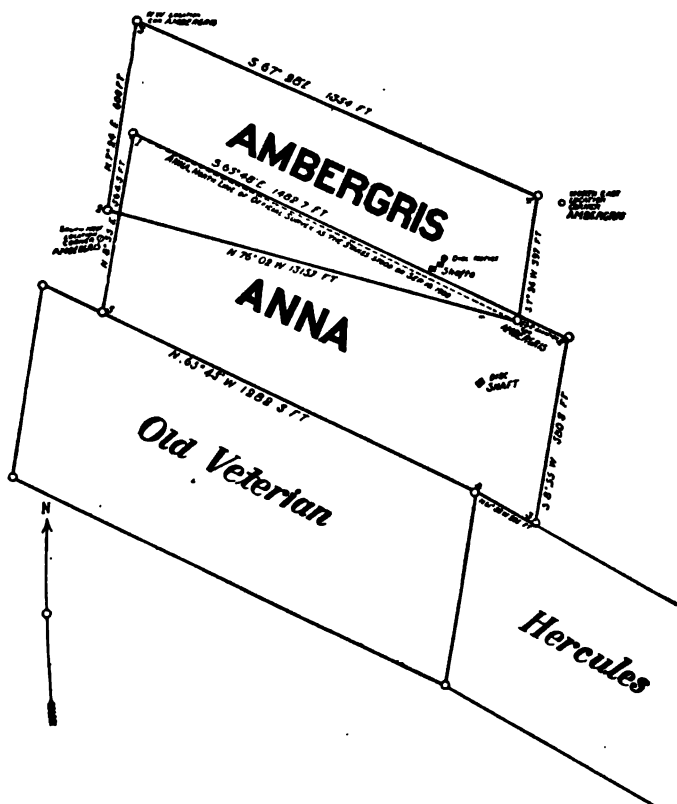
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Hyman v. Wheeler, 29 Fed. 347; *Jupiter v. Bodie etc. Min. Co.*, 11 Fed. 666, 7 Saw. 96; *Doe v. Waterloo Min. Co.*, 54 Fed. 935; *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302.)

A relocater cannot avail himself of the mineral in the public lands which another has discovered until the former discoverer has in fact abandoned the claim or under the law has forfeited his right thereto. (*Book v. Justice*, 58 Fed. 128; *Souter v. McGuire*, 78 Cal. 543, 21 Pac. 183; *Erwin v. Perego*, 93 Fed. 612, 35 C. C. A. 482; *Gwilin v. Donellon*, 115 U. S. 49, 29 L. ed. 348, 5 Sup. Ct. Rep. 110, *Quigley v. Gillette*, 101 Cal. 469, 35 Pac. 1040; *Harris v. Kellogg*, 117 Cal. 484, 49 Pac. 708; *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735.)

AILSHIE, J.—This suit was instituted by the appellant in support of an adverse claim to that portion of mining ground in conflict between the Anna and Ambergris lode claims. The appellant is the owner of the Ambergris lode and the respondents are the owners of the Anna lode. The respondents base their claim upon a location dated the nineteenth day of August, 1901, on which date Paulson and Hutton, who were two of the owners of the Hercules lode claim, made their location of the Anna claim, and thereafter, on August 31st, caused the same to be duly recorded. On the fourth day of October, 1901, John King, the predecessor in interest of the appellant, made discovery of the Ambergris claim and posted what he terms a preliminary notice, and marked the boundaries of the claim and performed the location work. On October 25th, King posted legal and lawful notice on the Ambergris claim, and on the same date caused the notice to be duly recorded. The Ambergris location overlapped a portion of the Anna claim. The conflict is shown by plaintiff's exhibit "E," which also shows the location of the Anna and Ambergris with relation to the Hercules, concerning which considerable evidence was introduced and about which there is much controversy in this case. For convenience in reference, exhibit "E" will be included herein, and is as follows:

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Respondents applied for a patent to the Anna, and the appellant thereupon, within the statutory time, filed an adverse claim and commenced this suit in support thereof. The appellant bases its claim to the right of possession of the ground in conflict upon the grounds; "1. Because of the fact that the Anna is not based upon any valid discovery of the ledge, lode or vein of mineral-bearing rock in place; 2. Because the respondents did not within sixty days from the date of their location perform the location work required by law." The cause was tried by the court and findings of fact and conclusions of law were made and filed, and judgment was thereupon entered in favor of the defendants. Plain-

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tiff moved for a new trial, which motion was denied, and thereupon appealed from the judgment and order denying its motion for a new trial. After the plaintiff had introduced its evidence and rested its case, the defendant, August Paulson, was sworn and examined on behalf of the defense, and testified to his acquaintance and familiarity with the Hercules and Fire Fly claims, which are adjoining claims. He was thereupon asked the following question: "What did you find in those claims at that time on the Fire Fly?" To this question counsel for the plaintiff objected on the ground of incompetency and that evidence of the nature, condition and character of the Hercules vein was wholly immaterial, and on the further ground that the plaintiff had not been permitted to examine the Hercules property. The objection was overruled by the court, and the witness thereupon narrated the conditions which led up to the discovery of the Hercules vein and the character of the gangue and vein matter and ore body therein, and the fact that he found soft white porphyry carrying mineral traces and mixed with the ore body. The witness described the same kind of ore, vein and gangue matter in the Fire Fly and then testified to finding similar surface conditions at the Anna claim. He also testified that, judging from the character of rock and the formation and traces of ore as found on the Hercules at the time of its discovery, and the fact that those indications and traces led to the development of a rich and paying mine in the Hercules, a miner, familiar with those facts and the peculiar formation in that particular locality, would be justified in locating another claim in the same vicinity based upon similar rock and like mineral traces, and outcroppings and formation. Several other witnesses testified on behalf of the defendants, over the objection of plaintiff, to the same effect and like conditions and circumstances as that testified to by Paulson. After the defendants had introduced all their evidence and rested their case, counsel for plaintiff moved the court for an order permitting plaintiffs' witnesses to examine and inspect the Hercules mine, and that for such purpose the court might continue the further hearing of the case

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until such time as the plaintiff could have an examination made in order to be able to meet and rebut the evidence produced by the defendants in reference to the Hercules vein and the character of the rock, ore and gangue matter found therein. The court denied this motion and the plaintiff again excepted. The rulings of the court in admitting the evidence concerning the Hercules mine, comparing the formation therein with the Anna, and in refusing to grant plaintiff an order for examination and inspection of the Hercules and refusing a continuance for that purpose, are assigned as error on this appeal.

Our consideration of the objection to the class of evidence admitted on behalf of the defendants has forced us to the conclusion that such evidence is admissible and competent in this class of cases. If a miner has discovered certain mineral indications which he has followed up with the result that a rich and valuable ore body has been developed therefrom, it seems clear that another miner finding similar indications and conditions on contiguous ground or in the immediate vicinity would be in a measure justified in following up those evidences with a reasonable expectation of finding mineral deposits. And this is true even though the indications, rock and deposits found are such as the expert, scientist, geologist and mineralogist in their finest theories tell him are not evidence of mineral deposits, or even that they are evidences of the entire absence of mineral. As a matter of fact, and greatly to their credit, those scholars who have added so largely to the store of knowledge have been observant and progressive enough to, from time to time, revise and modify their views and theories to keep apace with the actual demonstrations of the man who risks his judgment (though oftentimes a hazard) and delves into the earth at uninviting and unseemly places. The miner, as well as the man engaged in any other occupation or business, is entitled to act on experience and observations, and while he may not, and indeed will not, always attain the same results, the exception to the rule does not preclude him from availing himself of his own observations and those of his fellows as

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well as demonstrated existing conditions. We are not, however, without the aid of judicial expression on this question. In *Shoshone Min. Co. v. Rutter*, 87 Fed. 807, 31 C. C. A. 223, Judge Hawley speaking for the court of appeals for the ninth circuit, said: "The seams, containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued developments thereon had resulted in establishing the fact that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value. The discovery made at the time of the Kirby location was therefore such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located. (*Erhardt v. Boaro*, 113 U. S. 528, 536, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560.) The subsequent developments made after the claim was located, and before the location of the Shoshone, show more clearly the existence of a lode or vein."

In *Harrington v. Chambers*, 3 Utah, 94, 1 Pac. 362, the syllabus says: "Evidence as to what sort of indications other miners would follow in attempting to find a lode is admissible, not as stating the opinions of third parties, but as stating the value of the indications in the mining community. A lode is whatever the miners could follow and find ore." This holding by the supreme court of Utah was affirmed by the United States supreme court in *Chambers v. Harrington*, 111 U. S. 350, 28 L. ed. 452, 4 Sup. Ct. Rep. 28. This brings us to a consideration of the application made by plaintiff for permission to examine the Hercules for the purpose of enabling its witnesses to testify concerning the natural conditions and formation as found in that mine. It does not seem to us that this phase of the case demands very extensive consideration here. It is so manifestly unjust and incompatible with the spirit of judicial inquiry to allow a litigant to employ, as a standard of comparison and test, a mine over which he has custody and absolute control, and from which he may exclude every other person, without

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allowing his adversary an opportunity of having witnesses inspect and examine the property, that it cannot receive the sanction or approval of the courts. If a litigant who offers evidence of this class and character is not willing that his adversary may inspect and examine the property used as a standard of comparison, then his evidence should be excluded. A branch of inquiry worthy of the introduction of evidence on the one side is subject to rebuttal by the other side, and he who opens up such field of inquiry cannot be permitted to preclude the possibility of the adverse party furnishing any contrary evidence on the subject. It should not have been necessary for the plaintiff to apply to the trial court for an order allowing an examination of the Hercules; the defendants in fairness, upon a mere request, should have permitted it. The examination requested by plaintiff should have been allowed, and if denied by the defendants, their evidence concerning the Hercules should have been excluded.

The appellant urges the insufficiency of the evidence produced by the respondents to establish a discovery of mineral-bearing rock in place by the locators of the Anna, and also its insufficiency to show that the location work required by law was ever done on the Anna claim prior to the Ambergris location. As above indicated, this case must be remanded for a new trial, and these questions of fact will have to be again submitted to a jury or the court, and a greater weight or preponderance of evidence on one side or the other may be produced at the next trial, and new and additional facts may be shown. For that reason we will express no opinion as to the weight and sufficiency of the evidence presented in this record.

There appears to be some difference between the respective parties as to the legal principle applicable in this case touching the discovery on the Anna. It should be borne in mind that the strictness with which the courts will inquire into the sufficiency and validity of an alleged mineral discovery depends upon the class of claimants to which the contestants belong. In *Migeon v. Montana Cent. Ry. Co.*, 77 Fed. 254, 23

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C. C. A. 156, the United States circuit court of appeals points out this distinction in the following manner: "There are four classes of cases where the courts have been called upon to determine what constitutes a lode or vein within the intent of different sections of the Revised Statutes; (1) between the miners who have located claims on the same lode, under the provisions of section 2320; (2) between placer lode claimants under the provisions of section 2333; (3) between mineral claimants and parties holding townsite patents to the same ground; (4) between mineral and agricultural claimants of the same land. The mining laws of the United States were drafted for the purpose of protecting the *bona fide* locators of mining ground and at the same time make necessary provision as to the rights of agriculturists and claimants of townsite lands. The object of each section, and of the whole policy of the entire statute, should not be overlooked. The particular character of each case necessarily determines the rights of the respective parties, and must be kept constantly in view, in order to enable the court to arrive at a correct conclusion. What is said in one character of cases may or may not be applicable in the other. Whatever variance, if any, may be found in the views expressed in the different decisions touching these questions arises from the difference in the facts and in a difference in the character of the cases, and the advanced knowledge which experience in the trial of the different kinds of cases brings to the court. . . . The fact is that there is a substantial difference in the object and policy of the law between the cases where the determination of the question as to what constitutes the discovery of a vein or lode between different claimants of the same lode under section 2320, on the one hand, and a 'lode known to exist' within the limits of a placer claim at the time application is made for a patent therefor under section 2333, in the other. . . .

"The question as to what constitutes a discovery of a vein or lode under the provisions of section 2320 of the Revised Statutes has been decided by many courts. All the authorities cited by appellants are referred to in *Book v. Jus-*

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tice Co., 58 Fed. 106, 121. The liberal rules therein announced are substantially to the effect that when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. It was never intended that in such a case the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode." The same court in *Shoshone Min. Co. v. Rutter*, *supra*, again said: "The purpose of the statute in requiring that 'no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located,' was to prevent frauds upon the government by persons attempting to acquire patents to land not mineral in its character. But as was said in *Bonner v. Meikle*, 82 Fed. 697: 'It was never intended that the court should weigh scales to determine the value of mineral found as between a prior and subsequent locator of a mining claim, on the same lode.'

"The location of the Kirby was made in 1886. The discovery of mineral then made was sufficient to induce the locators and their grantees to perform the amount of annual labor thereon as required by the mining laws; to expend their time and money in prosecuting the work thereon, in the belief and expectation of finding ore of profitable value therein."

The following authorities are to the same effect: *Book v. Justice Min. Co.*, 58 Fed. 120; *McShane v. Kenkle*, 18 Mont. 208, 56 Am. St. Rep. 578, 44 Pac. 979, 33 L. R. A. 851; *Muldrick v. Brown*, 37 Or. 185, 61 Pac. 428; *Iron S. M. Co. v. Cheeseman*, 116 U. S. 529, 29 L. ed. 712; 1 Snyder on Mines, sec. 345; *Harrington v. Chambers*, 3 Utah, 94, 1 Pac. 375.

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In *Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98, the plaintiff requested the following instruction: "A lode, within the meaning of the statute, is whatever the miner could follow, and find ore. Under the requirements of the law, a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore; and a valid location of a mining claim may be made of a ledge deep in the ground, and appearing at the surface, not in the shape of ore, but in vein matter only." The trial court had modified the instruction by changing the word "willing" to "justified." Concerning that change in the instruction, this court, speaking through Mr. Justice Morgan, said: "The word 'justified' radically changes the whole meaning of the instruction. The question whether the miner is willing to spend his time and money is an entirely different one from the question whether he is justified in doing it. The former is a question to be answered by the miner himself, with or without advice, as he may choose. The latter word would present a question for experts, and for the jury to determine. The instruction was correct without modification." In support of the foregoing statement the court cite *Harrington v. Chambers*, *supra*. Mr. Lindley, in volume 1 (second edition), section 336, of his work on Mines, after stating the principle announced in *Burke v. McDonald*, and citing that case, proceeds as follows: "But it would seem that the question could not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induced him to locate, should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property."

Judging from the cases cited by the author in support of the foregoing statement, we infer that he makes that statement as a general principle and without any intention of

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its special application to a contest between two miners who have located the same ground as a lode claim. His authorities do not support a stronger position. Again, under our statute, the discovery must be followed by doing the location work within sixty days which in itself is, at least, a partial "exploitation." Where one miner has discovered what he considers mineral indications and deposits, and has followed up that discovery by staking the claim and doing the necessary location work, and another miner comes along and makes a discovery, and locates a part or all of the same ground covered by the former location, and thereupon goes into court to contest the senior location, and in order to sustain that contest shows that the ground does in fact contain valuable mineral deposits as contemplated by section 2320 of the Revised Statutes of the United States, and at the same time contends that the senior locator had not made a mineral discovery, the courts will not examine the evidence of the senior discovery with very great strictness. The case is quite different from a contest between the miner and the agriculturist.

The foregoing views cannot, of course, be carried to the extent of relieving anyone who claims ground under the mineral laws of the United States from a substantial compliance with the United States statutes in the matter of mineral discovery. The observation of Justice Field in *Erhardt v. Board*, 113 U. S. 537, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560, is worthy of repetition here. He said: "It would be difficult to lay down any rules by which to distinguish a speculative location from one made in good faith with a purpose to make excavations and ascertain the character of the lode or vein, so as to determine whether it will justify the expenditures required to extract the metal; but a jury from the vicinity of the claim will seldom err in their conclusions on the subject."

Anent the contention that the location work was never done on the Anna, counsel for appellant cite *Lavagnino v. Uhlig*, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716, while respondents cite on the same point *Belk v. Meagher*,

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104 U. S. 279, 26 L. ed. 735. It is contended by appellant that this most recent ruling of the United States supreme court overrules the doctrine as to location of forfeited and abandoned claims announced in the earlier case. It has been generally understood throughout the mining states that *Belk v. Meagher* had become the settled law to the effect that no valid relocation can be made on a mining claim until the rights of the former locator have been finally forfeited or abandoned, and that a location made after the forfeiture or abandonment would take precedence over such invalid relocation; but *Lavagnino v. Uhlig*, decided less than a year ago, appears to have entirely upset that doctrine, and it will be a matter of great interest to the lawyers and courts, as well as the miners of these western states, to know just whether these cases are distinguishable on principle or the one overrules the other entirely.

For the error above considered, the judgment must be reversed, and it is so ordered, and a new trial is granted. Costs awarded in favor of appellant.

Stockslager, C. J., concurs.

SULLIVAN, J., Concurring.—I concur in the conclusion reached and fully indorse what is said by Mr. Lindley in volume 1 (second edition), section 336. This court in *Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98, did not say, nor intend to convey the idea, that a valid mining claim could be made upon alluvial soil not containing a vein or lode, or upon loose slide rock or debris on the mountainside, simply because the locator was "willing" to spend his time and money in prospecting it with the expectation of finding a lode or vein of mineral-bearing rock. In that case the court said: "And a valid location of a mining claim may be made of a ledge deep in the ground, and appearing at the surface, not in the shape of ore, but in vein matter only." The terms "vein" and "lode" have been so often defined by the courts of the United States, that it is unnecessary for me to cite many

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authorities as to the well-known, established and accepted meaning of those terms. Many of the decisions defining those terms are collected in volume 5 of Words and Phrases Judicially Defined, under the word "lode," page 4423. Justice Field in the case of *Eureka Consolidated Min. Co. v. Richmond Min. Co.*, 4 Saw. 302, Fed. Cas. No. 4548, defines a "lode" to be "a zone or belt of mineralized rock, and lying within boundaries clearly separating it from the neighboring rock." In *Book v. Justice Min. Co.*, 58 Fed. 106, it is said, the word "lode" as used in the United States statutes, and as understood by miners, is applicable to any body or belt of mineralized rock lying within clearly defined boundaries separating it from the country or nonmineral rock. If in a certain district the country rock is limestone, and veins or lodes of mineral are found in such country rock, the Revised Statutes of the United States and of the state of Idaho, in regard to the location of quartz claims, do not contemplate that a valid location can be made upon such limestone without first having discovered some vein or lode within such country rock. It is shown in the record in this case that many of the most important mines of Shoshone county are found in quartzite, that being the country rock of that region, that contains traces of mineral. It is clear to me that simply because veins or lodes of mineral-bearing matter are found within such quartzite or country rock, a valid location cannot be made on the quartzite without first having discovered some vein or lode therein. Section 2320 of the Revised Statutes of the United States clearly contemplates that quartz mining claims can only be located upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar or other metals of value. Said section is as follows: "Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, 1872, whether located by one or

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more persons, may equal, but shall not exceed, fifteen hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, 1872, render such limitation necessary. The end lines of each claim shall be parallel to each other."

That section contemplates that the vein or lode must be first discovered before a valid location can be made. It provides, *inter alia*, that no claim shall extend more than three hundred feet on each side of the middle of the vein or lode, and as the law contemplates that boundaries of the claim must be marked upon the ground, how could they be marked upon the ground without having first discovered the vein or lode, in order to ascertain the distance of three hundred feet on each side of the center thereof? Section 3100 of the Revised Statutes of Idaho, as amended by the Laws of 1899, page 367, is as follows: "Mining claims hereafter located upon veins or lodes of quartz, or other rock in place bearing any of the metals, or other valuable deposits mentioned in section 2320 of the Revised Statutes of the United States, may extend to three hundred feet on each side of the middle of the vein or lode; *provided*, that when the locators have set the stakes, posts or monuments described in the next section, to indicate the line of the vein, ledge or lode, such stakes, posts or monuments must be taken for the purposes of said location, to mark correctly the line thereof, and such line must not be afterward changed so as to affect rights acquired or interfere with any location made subsequent thereto." That section provides that the location may extend three hundred feet on each side of the middle of the vein or lode, and it contemplates that the locator shall mark the same with posts or monuments to indicate

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the line of the vein, ledge or lode. Section 3101 of the Revised Statutes, as amended, provides that the locator at the time of making the discovery of such vein or lode must erect a monument at such place of discovery, and within three days after making the discovery must mark the boundaries of his claim. The law clearly contemplates that the discovery of a vein or lode must be made before a valid location can be made thereon; simply because the country rock of a certain district is porphyry or granite or limestone or quartzite, and that veins carrying any of the precious metals have been discovered therein, the law does not contemplate that a valid quartz claim location can be made upon such porphyry or other country rock. Had Congress intended that a valid quartz claim location could have been made on any ground where the locator was "willing" to expend his time and money in prospecting for a vein or lode, it certainly would have used different language from that used in section 2320 of the Revised Statutes of the United States. To hold that valid location of a quartz claim may be made upon porphyry or limestone, that being the country rock in which valuable mines have been discovered, would be in direct violation of the provisions of said section. If the prospector discovers "float" on the mountainside, which is covered with loose slide rock and debris or soil, he could not make a valid location thereon until he had discovered a vein or lode "of quartz or other rock in place bearing some valuable deposit," even though he were "willing" to spend his time and money trying to discover a vein or lode. The "discovery" must be made before location can be made.

In *Migeon v. Montana Cent. Ry. Co.*, 77 Fed. 249, 23 C. C. A. 156, Judge Hawley, who has written many of the most important mining decisions on the Pacific slope, referring to the case of *Book v. Justice Min. Co.*, 58 Fed. 106, said: "The liberal rules therein announced are substantially to the effect that when a locator of a mining claim finds rock in place [observe the words "finds rock in

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place"; not "hopes" to find rock in place or is willing to try to find rock in place] containing mineral in certain quantity to justify him in expending his time and money in prospecting and developing a claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor." There the term "rock in place" is used, the identical expression used in section 2320 of the Revised Statutes of the United States, thus clearly holding that something more permanent must be discovered than mere shale, slide rock or debris. Judge Hawley there states, "It was never intended that in such a case the court should weigh scales to determine the value of the mineral found as between a prior and a subsequent locator of a mining claim on the same lode." That, no doubt, is true, but nearly all of the decisions emphasize the fact that a vein or lode of rock in place must first be discovered before a valid location can be made, and clearly indicate that a valid location cannot be made upon a "hope and desire" to discover by future developments.

While in the opinion in this case it is not intended to hold that a valid location could be made upon loose debris or slide rock without first discovering a lode or vein therein, I desire to emphasize my views upon that question as above set forth.

(February 28, 1906.)

B. H. COLEMAN et al., Respondents, v. L. A. JAGGERS,
Appellant.

[85 Pac. 894.]

**ACTION TO DETERMINE ADVERSE CLAIM—TITLE TO REAL ESTATE—
SEPARATE PROPERTY OF WIFE—EXEMPTIONS—EXECUTION SALE.**

1. Under the provisions of section 4538 of the Revised Statutes, an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim.

Argument for Appellant.

2. Under the jurisdiction and practice in equity, independent of statute, a bill to quiet title cannot be maintained unless the possession and legal title are in the complainant, but that rule of equity practice has been greatly modified by the provisions of section 4538 in this state, and an action may be maintained although the plaintiff have neither the possession nor the legal title thereto.

3. Under the provisions of said section 4538, a suit may be brought by anyone claiming some right or interest in land to determine any adverse claim thereto.

4. By the provisions of section 1, article 5 of the constitution of Idaho, the distinction between actions at law and suits in equity and the forms of all such actions and suits are prohibited, and there is but one form of action in this state for the enforcement or protection of private rights or the redress of private wrongs.

5. By the provisions of section 20, article 5 of the constitution, the district court is given original jurisdiction in all cases both at law and in equity, as well as certain appellate jurisdiction.

6. Under the provisions of section 4168 of the Revised Statutes, the complaint is only required to contain the title of the court and cause, a statement of the facts constituting the cause of action in ordinary and concise language, and the demand for relief, and the district court is authorized to grant such relief, whether in equity or at law, as the parties are entitled to under their allegations and proof.

7. Under the provisions of our constitution and statute, the district court has equitable jurisdiction, and is authorized to exercise it in all cases where the remedy at law is not adequate, complete and certain so as to meet all the requirements of justice in the case.

8. *Held*, under the evidence in this case that the trial court was justified in finding that the premises in dispute were not the separate property of the appellant.

(Syllabus by the court.)

APPEAL from the District Court of the Third Judicial District for Boise County. Hon. George H. Stewart, Judge.

Action to determine adverse claim to real property. Judgment for the plaintiffs. *Affirmed*.

H. L. Fisher, for Appellant.

An action to quiet title cannot be maintained against the holder of the legal title by the holder of an equitable title. (*Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518;

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Nidever v. Ayers, 83 Cal. 39, 23 Pac. 192; *Harrigann v. Mowry*, 84 Cal. 458, 22 Pac. 658, 24 Pac. 48; *Brewer v. Houston*, 58 Cal. 345; *Shanahan v. Crampton*, 92 Cal. 13, 28 Pac. 50; *Learned v. Welton*, 40 Cal. 349; *Chase v. Cameron*, 133 Cal. 231, 65 Pac. 460; *City and County of San Francisco v. Ellis*, 54 Cal. 72, 65 Pac. 460; *Castro v. Barry*, 79 Cal. 448, 21 Pac. 946; *Frost v. Spitley*, 121 U. S. 552, 30 L. ed. 1010, 7 Sup. Ct. Rep. 1129; *Moore v. Townshend*, 102 N. Y. 387, 7 N. E. 401.)

As against a stranger to the judgment, plaintiff must show that defendant had title. (*Reilly v. Wright*, 117 Cal. 80, 48 Pac. 970.)

An estate cannot be conveyed on an execution sale on a judgment, in an action to which the wife was not a party. (*Svetinich v. Sheean*, 124 Cal. 216, 71 Am. St. Rep. 50, 56 Pac. 1028.)

Karl Paine, for Respondents.

Section 4538 of the Revised Statutes authorizes an action to be maintained to determine any adverse claim. (*Shields v. Johnson*, 10 Idaho, 454, 79 Pac. 393; *Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784; *Fry v. Summers*, 4 Idaho, 424, 39 Pac. 1118.)

The foregoing decisions of this court have interpreted section 4538 to mean that every estate or interest known to the law, whether legal or equitable, may be determined and adjudicated in an action of this kind.

The action (to quiet title) has been greatly extended by statute, and in many states is the ordinary mode of trying disputed titles. (3 Pomeroy's Equity Jurisprudence, sec. 1395.)

The borrowed money with which the hotel was purchased was community property. (*Northwestern etc. Bank v. Rauch*, 7 Idaho, 153, 154, 61 Pac. 516; *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. 719.)

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The common property of the marital community might be sold upon execution for the debts of the husband. (*Law v. Spence*, 5 Idaho, 251, 48 Pac. 282.)

SULLIVAN, J.—This action was brought by the respondents to quiet the title to certain premises situated in Center-ville, Boise county. The action was originally brought against Joseph A. Jaggars and L. A. Jaggars, husband and wife, and H. C. Granger and Belle Granger, husband and wife. It appears from the record that Joseph Jaggars and H. C. Granger were engaged in the saloon business in Center-ville and became indebted to the respondents; that respondents recovered judgment against them, and the premises in controversy were sold at sheriff's sale and purchased by the respondents; they thereafter procured a sheriff's deed to said premises, and base their claim of ownership on said sheriff's deed. Granger and his wife and Joseph Jaggars filed a disclaimer in this suit, and Mrs. Jaggars filed her separate answer denying the allegations of the complaint as to the ownership of said premises by the respondents and their right to the possession thereof. She averred that she was the owner and entitled to the possession of the premises, having paid the entire purchase price therefor out of her separate means and property, and that the same was acquired by her as her separate property and estate, and that she had never conveyed the same to anyone. The cause was tried by the court without a jury and judgment entered in favor of the respondents. The first five errors assigned were considered on the argument of this case together. It is contended by counsel for appellant that the undisputed evidence shows that neither the respondents nor the judgment debtors through whom they claim ever had the legal title to the premises in question, and that the legal title now stands in the appellant; that being true, it is contended that an action to quiet title cannot be maintained against the holder of the legal title by the holder of the equitable title. In support of that contention counsel cites the following authorities:

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Von Drachenfels v. Doolittle, 77 Cal. 295, 9 Pac. 518; *Nidever v. Ayers*, 83 Cal. 39, 23 Pac. 192; *Harrigann v. Mowry*, 84 Cal. 458, 22 Pac. 658, 24 Pac. 48; *Shanahan v. Crampton*, 92 Cal. 13, 28 Pac. 50; *Chase v. Cameron*, 133 Cal. 231, 65 Pac. 460; *Castro v. Barry*, 79 Cal. 448, 21 Pac. 946; *Frost v. Spitley*, 121 U. S. 552, 30 L. ed. 1010, 7 Sup. Ct. Rep. 1129; *Moore v. Townshend*, 102 N. Y. 387, 7 N. E. 401. The case of *Drachenfels v. Doolittle*, *supra*, was decided by the supreme court of California in 1888, and it is there held that an action to quiet title cannot be maintained by the owner of an equitable interest as against the holder of the legal title, and cites in support of that proposition only one case—that of *Frost v. Spitley*, 121 U. S. 552, 30 L. ed. 1010, 7 Sup. Ct. Rep. 1129.

The California court seems to have held strictly to the general principles of equity jurisprudence as administered by the chancery courts of England, regardless of the provisions of section 738 of the Code of Civil Procedure of that state. That section is identically the same as section 4538 of the Revised Statutes, and is as follows: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

In *Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 806, the court apparently took a little broader view of the provisions of that section than it had in some previous cases and said: "But as this court in the past has had occasion to remark, section 738 of the Code of Civil Procedure is broad in its terms; it possesses no limitations or restrictions; and we see no reason why it does not vest in the holder of an equitable title the right to come before the court and have their equities declared superior to any and all opposing equities." The court also said: "There are cases in this state holding that the possessor of an equitable title cannot bring an action to quiet such title against the holder of the legal title," and cites in support of that proposition the authorities above cited. Under the jurisdiction and practice in equity, both in English and in the

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courts of the United States, independent of any statute, a bill to quiet title cannot be maintained without clear proof of both possession and legal title in the complainant, hence one holding the equitable title could not sustain an action against one holding the legal.

In *Frost v. Spitley*, *supra*, which was an appeal from the United States circuit court of the district of Nebraska, the statute of that state authorized an action to quiet title to be brought by any person or persons whether in actual possession or not, and in that case the supreme court of the United States held that the requisite of the plaintiff's possession was dispensed with by statute. That statute, however, did not dispense with the requisite, that the plaintiff must have the legal title, as required by the ancient equity jurisdiction and practice in such cases. That is the only case cited in support of the rule laid down in *Drachenfels v. Doolittle*, *supra*, which case seems to be the leading case in California, and there the supreme court of the United States recognizes the fact that the general jurisdiction of the courts of equity in regard to such actions has been changed in many of the states by statute. Independent of statute, the equity jurisdiction to quiet title was intended to protect the legal owner of such title from being harassed by suits in regard to the title, and originally such equity jurisdiction could be invoked only by a plaintiff in possession holding the legal title. Such suits have been extended by statute; in many states it is the ordinary mode of trying a disputed title, and suits under such statutes are not now particularly designated as proceedings to quiet title, but are known and designated as proceedings for the determination of adverse claims.

In volume 6, section 735 of Pomroy's Equity Jurisprudence, third edition, the author there says: "The statutory action to determine an adverse claim is an improvement upon the old bill of peace. The statute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It is not necessary, as formerly, that the plaintiff should first establish his right by an action at law. He can immediately, upon knowledge of such claim, require the

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nature and character of the adverse estate or interest to be produced, exposed and judicially determined, and the question of title be thus forever quieted.”

In section 738, Id., the author says: “As a general rule, the suit may be brought by anyone claiming some right or interest in the land. In most of the states the owner of an equitable interest, as well as the owner of the legal title, may maintain the suit to determine adverse claims.” In jurisdictions where courts of equity and courts of law are separate and distinct, and where the equity jurisdiction to quiet title was intended to protect the legal owner of the title from being harassed in regard to such title, the equitable owner could not maintain an action against the one holding the legal title, and in such jurisdiction the one holding the equitable title is required to go into a court of law first to establish his rights, as equity had no jurisdiction of the case for the reason that the *law courts* concern the legal title only, and that the plaintiffs had a plain, adequate and complete remedy at law. But this method of protecting a person's rights was found very cumbersome and vexatious, as in some cases several suits had to be brought before the party could obtain all of his rights. The inability of a court of law to afford adequate relief was the strong argument in favor of extending the jurisdiction of a court of equity in this class of cases. This feature of the matter is commented upon in *Wehrman v. Conklin*, 155 U. S. 314, 39 L. ed. 167, 15 Sup. Ct. Rep. 129. A statute of the state of Iowa was involved in that case, which statute enlarged the jurisdiction of courts of equity in three particulars at least: (1) It did not require the plaintiff to have been annoyed or threatened by repeated acts of ejectment. (2) It dispensed with the necessity of his title having been previously established in an action at law. (3) The suit might be brought by a party having the equitable title, as well as a party having the legal title. Statutes thus enlarging the jurisdiction of courts of equity have been held to be constitutional. (*Wehrman v. Conklin*, *supra*.)

By the provisions of section 1, article 5 of the constitution of Idaho, the distinction between actions at law and suits in

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equity and the forms of all such actions and suits are prohibited, and we have but one form of action in this state for the enforcement or protection of private rights or the redress of private wrongs, and by the provisions of section 20 of said article, the district court is given original jurisdiction in all cases both at law and in equity as well as certain appellate jurisdiction, and under the provisions of section 4168 of the Revised Statutes, the complaint in each and every case besides the title of action, etc., is only required to contain a statement of the facts constituting the cause of action in ordinary and concise language and demand for relief. Thus many of the rules of pleading in other jurisdictions in both suits in equity and actions at law have been greatly modified and changed. The provisions of said section 4538 of the Revised Statutes above quoted are very broad, and under them any person, whether in possession or out of the possession, whether holding the legal title or equitable title or what not, may bring his action against another who claims an estate in real property adverse to him, and may in such action have the adverse claim determined and settled.

Under our constitution and statutes equitable jurisdiction exists and will be exercised in all cases and under all circumstances where the remedy at law is not adequate, complete and certain, so as to meet all the requirements of justice. That there is a legal remedy is not sufficient. Such remedy, in order to oust or prevent the equitable jurisdiction, must be in all respects as satisfactory as the relief furnished by a court of equity. (1 Pomeroy's Equity Jurisprudence, 3d ed., sec. 297.) In the case at bar, if the plaintiffs were required to bring an action at law in ejectment or otherwise, and their right to the possession of the premises in dispute should be adjudged in their favor, then in order to clear their title they would have to bring a suit in equity to annul the legal title held by the appellant. Thus it is shown that an action at law would not be adequate, complete and certain, and meet all the requirements of justice.

One of the objects of our practice act and the provisions of our state constitution in abolishing all distinctions between

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actions at law and suits in equity, and giving our district courts full and complete jurisdiction both at law and in equity, was to rid our system of a multiplicity of suits and a vexatious and cumbersome procedure, and to give litigants full and complete relief in a single action, where under the old practice several suits were necessary to accomplish that result. And in the case at bar there is no good reason why the title may not be fully settled and determined between the parties. The provisions of section 4538 of the Revised Statutes, and the decisions of this court in *Shields v. Johnson*, 10 Idaho, 476, 79 Pac. 393, *Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 791, *Fry v. Summers*, 4 Idaho, 424, 39 Pac. 1118, settle this contention, for under them we think every estate or interest known to the law in real property, whether legal or equitable, may be determined in an action of this kind.

The other errors assigned may be considered under the general head of the insufficiency of the evidence to sustain the decision. While the testimony of the appellant shows that she paid for the premises in question with money borrowed by her husband for her which he repaid to the persons from whom it was borrowed, there is sufficient evidence in the record to throw decided suspicions upon that evidence and its utter inconsistency; instead of taking the deed in her own name, she took the deed from the grantor in the name of herself and a Mrs. Granger, whose husband was the partner of Jaggars in the saloon business. Her explanation of that fact is very lame. While Granger himself testified that at the time of the said purchase Jaggars and himself were running a saloon. They were paying \$16 a month rent and were not doing a very large business, and Granger proposed to Jaggars that they buy the hotel building in question, and Jaggars replied that he had been thinking about that, and it was there arranged that Jaggars should negotiate for said premises. A few days after that conversation Jaggars informed Granger that he had purchased the premises. Granger asked him if he had money sufficient to pay for it. He replied that he had sufficient; that he had a check for something over \$70, and that he had sufficient. Granger replied that if he hadn't, he

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had a little at their home which he would let him have. Jaggars thereupon asked Granger if they hadn't better have it deeded to their wives, and Granger replied that it did not matter to him. Granger further testified that his understanding was that he owned half of the premises, and that he thereafter sold it to Jaggars after they had dissolved partnership in the saloon business; that in their agreement Jaggars agreed to settle all bills owing by the partnership and was to take the property and continue the business. This partnership was dissolved a few days after the purchase of the said building, and the partnership was indebted at that time in the sum of about \$200; that shortly before the trial of this cause, at the request of the appellant's attorney, Granger and his wife conveyed by quitclaim deed whatever title they held in said premises to Mr. Jaggars, and Jaggars thereafter conveyed it to his wife, the appellant.

The trial court having seen the witnesses on the stand, observed their demeanor and heard them testify, is better qualified to judge of the weight to be given to the testimony of each than this court. That court evidently concluded that said premises were not the separate property of the appellant, and we think that the evidence was sufficient to sustain the judgment. The judgment is therefore affirmed, with costs in favor of respondents.

Stockslager, C. J., concurs.

AILSHIE, J., Concurring.—I concur with my associates in the conclusion reached as to the legal propositions involved in this case. As to the sufficiency of the evidence, however, to support the findings and judgment, I have considerable doubt. While there was some evidence supporting the judgment, it was principally hearsay, and incompetent as against Mrs. Jaggars, the only defendant in this case. The best that can be said for the evidence in the case is that it was desultory and highly circumstantial; rather below the standard of certainty that should be required before taking from a married woman the fruits of her daily labor.

Argument for Appellant.

(March 2, 1906.)

HENRY W. LEMAN, Receiver of JAMES M. WANZER and WILLIAM H. CHADWICK, Copartners as WANZER & CO., Appellant, v. RICHARD CUNNINGHAM, Respondent.

[85 Pac. 212.]

FOREIGN JUDGMENT—REVIVOR—STATUTE OF LIMITATIONS.

1. Where W. & Co. obtained a judgment against C. and others, in Nebraska in April, 1895; before any part of said judgment was paid, C. moved to Idaho in 1897, and has continued to so reside until the commencement of this action; C. was in Nebraska in 1905, when service of an order or motion for revivor of said judgment was had upon him; thereafter and on the tenth day of October, 1905, C. appeared in court by attorney when an order of revivor was made in said court: *Held*, that such order of revivor gave new life to the judgment, and the statute of limitations of this state does not begin to run until after such revivor, and that an action may be commenced in the courts of Idaho any time within six years after such order of revivor.

(Syllabus by the court.)

APPEAL from the District Court of the Third Judicial District for Ada County. Hon. George H. Stewart, Judge.

Appellant sought in the lower court to recover on a foreign judgment. Judgment for the defendant. *Reversed*.

Hawley, Puckett and Hawley, for Appellant.

The only question involved is whether section 4051 of the Revised Statutes prevents a recovery in this cause. If it is considered that the revivor of the judgment made by the Nebraska court in 1905 is in effect a judgment, then appellant must prevail.

All statutes in reference to the revivor of judgments supply a method of procedure in lieu of the writ of *scire facias*, and this is notably the case so far as the Nebraska statute is concerned. (*Humister v. Smith*, 21 Cal. 130; *Ames v. Hoy*, 12 Cal. 19; *Cameron v. Young*, 6 How. Pr. (N. Y.) 372.)

Argument for Respondent.

The order reviving a judgment is in itself a new judgment and the proceedings leading up to the entry constitute an action. (*Briers v. Traders' Nat. Bank*, 24 Wash. 695, 64 Pac. 831.)

In an action based upon a judgment of revivor in another state, the statute of limitations runs from the date of the revivor, not from the original judgment. (*Fagan v. Bentley*, 32 Ga. 534; *Packer v. Thompson*, 25 Neb. 689, 41 N. W. 650; *Lindsey v. Lyman*, 37 Iowa, 206; *Bullard v. Lopez*, 7 N. Mex. 561, 37 Pac. 1103.)

A new judgment under our statute is a revivor of the old; simply a remedy obtainable by a civil suit, in effect the same as that formerly obtainable by the writ of *scire facias*. (*Haupt v. Burton*, 21 Mont. 572, 69 Am. St. Rep. 698, 55 Pac. 110; *Peters v. Vawter*, 10 Mont. 209, 55 Pac. 438.)

The revivor is treated by the Nebraska courts as a judgment. (*Dennis v. Omaha Nat. Bank*, 19 Neb. 675, 28 N. W. 512; *In re Bank of Commerce*, 153 Ind. 460, 53 N. E. 954, 55 N. E. 224, 47 L. R. A. 489.)

E. M. Wolfe, for Respondent.

The procedure is a motion for an order of revivor. (See Neb. Stats., p. 6039, sec. 460.)

Both in Nebraska and in Idaho, as well as in all other states, there is a recognized distinction between an order and a judgment. (*Bankers' Life Ins. Co. v. Robbins*, 59 Neb. 173, 80 N. W. 484; *Helper v. Davis*, 32 Neb. 556, 29 Am. St. Rep. 457, 49 N. W. 458, 13 L. R. A. 565.)

The controlling point in all of the decisions is, "Was a new judgment rendered?" (*Rice v. Moore*, 48 Kan. 590, 30 Am. St. Rep. 318, 30 Pac. 10, 16 L. R. A. 199; *Owens v. McCloskey*, 161 U. S. 642, 40 L. ed. 837, 16 Sup. Ct. Rep. 693; Black on Judgments, 498.)

In the Montana cases cited by appellant (*Haupt v. Burton*, 21 Mont. 572, 69 Am. St. Rep. 698, 55 Pac. 110; *Peters v. Vawter*, 10 Mont. 209, 55 Pac. 438), the court held that a new action must be brought which would, of course, be the

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means of securing a new judgment, and that would be the remedy in this state. A new complaint must be filed and a new judgment must be had.

STOCKSLAGER, C. J.—Appellant, as receiver for J. M. Wanzer & Co., commenced his action in the district court of Ada county against respondent as defendant. It is shown by the complaint that a judgment was rendered against respondent and others and in favor of Wanzer & Company on the twenty-second day of April, 1895, in the district court of Lancaster county, Nebraska, for the sum of \$1,782.78, no part of which was paid, and that a judgment of revivor was given in said court on October 10, 1905, personal service of the conditional order of revivor having been made upon defendant Cunningham, he appearing by attorney at the time said judgment of revivor was entered. Defendant answered by general denial and further pleaded the statute of limitations under the provisions of section 4051 of the Revised Statutes. The record contains an agreed statement of facts as follows: "1. It is stipulated that plaintiff is the duly appointed, qualified and acting receiver of the original owners of the judgment and is authorized to bring said action in this court. 2. That in August, 1889, at Lincoln, Nebraska, defendant became surety with others on an undertaking on appeal for one John C. Morrissey for the penal sum of \$2,000. 3. That on the twenty-second day of April, 1895, in the district court of Lancaster county, Nebraska, a judgment was rendered in favor of Wanzer & Company and against this defendant and others for the sum of \$1,782.78, and costs. 4. That said judgment remained unpaid and unsatisfied of the record, and still so remains, and that said judgment became dormant in said state on April 22, 1900, and that thereafter, on May 26, 1905, a conditional order of revivor was duly and personally served upon defendant Richard Cunningham at Lincoln, Nebraska, where he was remaining a few days on legal business as an attorney in a suit pending in said court, which said conditional order

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. . . . is attached hereto, marked exhibit 2, and made a part hereof; and thereafter such proceedings were had in said court that an order of revivor of said dormant judgment was duly and regularly made and entered in said court on October 10, 1905, by which said dormant judgment was duly revived with costs of said revivor proceedings. . . .

5. That defendant Cunningham was formerly a resident of the state of Nebraska, and left the state of Nebraska and abandoned his residence therein on August 20, 1897, and removed to Silver City in the state of Idaho, of which said state he became a resident and citizen of the state of Idaho, and has not been a resident or citizen of Nebraska since August 20, 1897; and that he has resided continuously at his home in Silver City in the state of Idaho ever since September, 1897. That he never concealed his residence nor departed therefrom except on three or four business trips in which he was not absent from the state of Idaho for more than thirty days in all since August 20, 189—. That he has resided continuously at his said home in Silver City, Idaho, and was there for more than eight years prior to the commencement of this action, and for more than seven and one-half years prior to the service on him of the said conditional order of revivor of said judgment, and prior to the commencement of the said proceedings for the revivor of the said dormant judgment. 6. That no part of said judgment has been paid either before or since the revivor thereof.”

It is conceded, as well as apparent from the record, that the only question for us to determine is whether this action is barred by the provisions of section 4051 of our Revised Statutes, 1887. It says: “An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, must be commenced within six years.” The important and controlling question is the effect to be given the order of revivor made by the Nebraska court on October 10, 1905. If it gives the old judgment new life in Nebraska, it has the same effect in this state. Learned counsel for appellant insist that the

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proceedings for the revivor of a dormant judgment in Nebraska has the same effect in that state as a new action to keep a judgment from becoming dormant in this state, whilst able counsel who represents the respondent urges that there is a wide distinction in the two remedies. He says Idaho provides a remedy for a new judgment, whilst in Nebraska provision is only made for an order of revivor of the old judgment, and that all proceedings after revivor must date back to the original date, hence the order of revivor does not aid the appellant in this action, as the record shows that the judgment which appellant seeks to enforce against respondent is barred by the statute. In Nebraska the judgment is revived on motion after proper service on the defendant, and after giving him an opportunity to show why such motion should not be granted. In Idaho the remedy is by new action, proper service, and if no sufficient defense is interposed a new judgment is the result. Our attention is not called to any provision of the Nebraska statute providing for a new suit to revive or restore to life a dormant judgment, neither have we any provision in our statute providing for revivor of a dormant judgment. Each state has provided its own way of keeping a judgment alive, but Nebraska has gone further than Idaho in providing a way to restore it to life after it has become dormant. Our statute is a little harsher and more exacting on the judgment creditor.

I have examined a great many authorities cited in this case, but it seems that the construction given the Nebraska statute by the court of last resort of that state should have much weight in determining this case. If the order of revivor had the effect of giving new life to the dormant judgment in Nebraska, to such an extent that it might be enforced in that state against the property of respondent if he had any there, then we think it could be enforced against his property in this state, if the action is commenced here within the life of the order of revivor there. *Packer v. Thompson*, 25 Neb. 689, 41 N. W. 650, discusses a case very similar to

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the one at bar. The action was brought in the district court of Gage county on a judgment recovered against the plaintiff in error in the state of Iowa. Thompson secured a judgment against Packer in the district court of Clayton county, Iowa, on the twenty-first day of May, 1866. In October, 1886, service was had on Packer while he was temporarily in the state of Iowa, and thereafter the judgment was revived, all of which is alleged to have been in fraud of his rights. A demurrer was sustained to the answer. Mr. Justice Maxwell, speaking for the court, says: "Does the answer state a defense? We think not. It is admitted that the Iowa court in the year 1886 obtained jurisdiction of the plaintiff in error by personal service. The fact that the judgment revived was recovered in 1866 can make no difference. If the plaintiff in error had remained in this state, no action could have been brought here on the 1866 judgment, as it is expressly within our statute of limitations, and would be barred in five years. (Code, sec. 10.) Where, however, the plaintiff in error voluntarily went into the state of Iowa, and service was had upon him there, he must contest his rights in the tribunals of that state, and if a judgment of revivor is obtained against him there, and an action brought on such judgment in this state within five years from the time of its rendition, our statute of limitations will not constitute a defense. Neither can we retry the merits of the case in this state. If the facts as to the fraudulent character of the note and judgment are as the plaintiff in error alleges them to be, he should have brought such facts to the attention of the Iowa court, which no doubt would have protected his rights. So of the statute of limitations. The judgment, being valid where rendered, is valid here, and the demurrer was properly sustained."

In the case of *Horbach v. Smiley*, 54 Neb. 217, 74 N. W. 623, Justice Noral, in discussing the priority of judgment liens on real estate, says: "It is true some of the judgments embraced in this class became dormant and, for a time, ceased to be liens upon the premises. (*Flagg v. Flagg*, 39 Neb. 299,

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58 N. W. 109.) But these judgments were subsequently revived, which had the effect to reinstate the liens upon the real estate from the date of the order of revivor. (*Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365; *Cathcart v. Potterfield*, 5 Watts (Pa.), 153; *Norton v. Beaver*, 5 Ohio, 178.)”

In *Brier v. Traders' Nat. Bank of Spokane*, 24 Wash. 695, 64 Pac. 831, Mr. Justice White, of the supreme court of Washington, discussing a judgment of revivor, says: “It is not the mere lien that is revived; it is the judgment itself, and the lien, as an incident of the revived judgment, if a certified copy is filed with the auditor, becomes operative in the same manner as if it was an original judgment. . . . The very term ‘revive’ means to restore or bring again to life. When revived, it becomes a new judgment, on which execution may issue as to personal liability, and it continues in existence for five years longer, from the date of the order of revival, and the lien thereof, like the judgment, an incident thereto, is a new creation, and dates from the order of revival.”

In *Bank of Commerce v. Willsie*, 153 Ind. 460, 53 N. E. 950, 954, 55 N. E. 224, 47 L. R. A. 489, Mr. Justice Baker, speaking for the court, said: “The primary meaning of ‘revive’ is to ‘give life to again.’ If it is a creative act to give life to dead matter once, it is no less a creative act to give life again to the same matter when it becomes dead. In the word ‘revive’ the syllable ‘re’ indicates the use of old matter, and the syllable ‘vive’ means ‘to give life to,’ which is one of the primary meanings of the word create.”

Counsel for respondent cites *Bankers' Life Ins. Co. v. Robbins*, 59 Neb. 173, 80 N. W. 484, in support of his theory that appellant only had “an order of revivor and not a judgment in the Nebraska court,” and quotes from the opinion in the above case as follows: “The statutory proceedings to revive a dormant judgment is a substitute for the common-law writ of *scire facias*. It is not the commencement of a civil action, but the continuation of an action previously commenced. The object in view is not to obtain a judgment, but to obtain permission of the court to execute a judgment already in

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existence." He also cites *Helper v. Davis*, 32 Neb. 556, 29 Am. St. Rep. 457, 49 N. W. 458, 13 L. R. A. 565. In this case a judgment was recovered against defendant in January, 1879, in the state of Illinois. Soon thereafter he moved to the state of Nebraska. On the twelfth day of October, 1888, the judgment in Illinois was revived in that state without jurisdiction of the person of the defendant. In December following, this action was brought in the district court of Fillmore county, upon the judgment so alleged to have been revived. The lower court made findings as above indicated, the important one being "that no personal service of the notice was had of said proceedings upon said defendant who then and now, and for eight years last past has continually been a resident of Fillmore county, Nebraska, and he had no notice or knowledge in any manner of said proceedings. It is, therefore, considered by the court that said cause of action did not accrue within five years next before the commencement of this action, and is, therefore, barred by the statute of limitations." The appellate court affirms this judgment, but distinguishes between this case and the Packer-Thompson case, *supra*, and reaffirms the latter case.

In our view of the case under consideration, it matters not what the final action of the district court of Nebraska may be termed—let it be an order reviving an old judgment, or let it be a new judgment, the object and purpose of the order is the same in either case. The effect is to continue in force in Nebraska a judgment against the defendant five years from the date of this order. Our statute would begin to run against the judgment or order of revivor from its date. This is not only true as shown by the decisions of the court of last resort of Nebraska, but a long line of authorities from other states are in harmony with this conclusion. Why should it be otherwise? Respondent was twice given an opportunity in the courts of Nebraska to defend against this judgment, or the claim upon which it is founded, yet we find a judgment rendered in the first instance and an order of revivor in the second, after respondent had had his day in court to show

Points Decided.

why the judgment should not be revived. When revived it is given new life, and our statute of limitations does not begin to run until after the date of the order of revivor.

The judgment is reversed and cause remanded for further proceedings consistent with the views herein expressed. Costs awarded to appellants.

Ailshie, J., and Sullivan, J., concur.

(March 2, 1906.)

In re WILLIAM BURGESS, JOHN BAILEY and JOHN McHARGUE.

[84 Pac. 1059.]

HABEAS CORPUS—ANTI-GAMBLING LAW—MAXIMUM PENALTY FOR VIOLATION—FINE AND IMPRISONMENT.

1. Under the provisions of section 1 of what is commonly known as the anti-gambling act (Sess. Laws 1899, p. 389), the lightest sentence that may be imposed upon one convicted of gambling is a fine of not less than \$200 or imprisonment in the county jail for not less than four months.

2. The heaviest penalty that may be imposed upon one convicted of gambling is that prescribed by section 6313 of the Revised Statutes, and may amount to both a fine of not exceeding \$300 and imprisonment not exceeding six months. *State v. Mulkey*, 6 Idaho, 617, 59 Pac. 17, and *In re Rowland*, 8 Idaho, 595, 70 Pac. 610, approved and followed.

3. Where a defendant has been convicted of gambling in violation of the provisions of the anti-gambling law, a sentence and judgment that he pay a fine of \$250 and be imprisoned in the county jail for a period of three months, is within the authority of law and jurisdiction of the court and is a proper sentence and judgment.

(Syllabus by the court.)

ORIGINAL application on behalf of William Burgess, John Bailey and John McHargue, for writs of *habeas corpus*.

The petitioners were convicted in the justice's court of West Weiser precinct, in Washington county, of the crime of gam-

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bling, and appealed to the district court in and for Washington county. Upon a trial in the district court the defendants were found guilty and sentenced by the judge to each pay a fine of \$250, and serve a term of three months in the county jail. They thereafter applied to the district judge of the seventh judicial district for a writ of *habeas corpus*, and the same was denied. They thereupon applied to this court for a writ, and the writ was granted, and the sheriff of Washington county made his return that he was holding the prisoners under sentence and judgment from the district court. Writ quashed and dismissed, and the petitioners remanded to the custody of the sheriff of Washington county.

Frank Harris, for the Petitioners, files no brief.

J. J. Guheen, Attorney General, and Edwin Snow, Assistant Attorney General, for the State, cite no authorities on the point decided, not cited by the court.

AILSHIE, J.—The contention is made by the petitioners that under section 1 of the anti-gambling act (Sess. Laws 1899, p. 389), the court was without jurisdiction and authority to impose a sentence of both fine and imprisonment. Section 1 of the law in question, after enumerating the acts prohibited, declares that anyone who commits any of the forbidden acts "is guilty of a misdemeanor and is punishable by fine not less than two hundred dollars or imprisonment in the county jail not less than four months."

In *State v. Mulkey*, 6 Idaho, 617, 59 Pac. 17, the contention was made that the anti-gambling law was unconstitutional and void, for the reason that it only fixed the minimum penalty to be imposed for its violation and established no maximum penalty whatever. This court answered that contention in the following manner: "The act in question fixes the minimum punishment, but does not fix the maximum. Section 1 of said act makes the offense a misdemeanor. Section 6313 of the Revised Statutes is as follows: 'Except in cases where a different punishment is prescribed by this code, every offense

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declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by fine not exceeding three hundred dollars, or by both.' Reading the act in question with said section 6313 of the Revised Statutes, both the maximum and minimum punishment are provided." The validity of this law again came under consideration in *Re Rowland*, 8 Idaho, 595, 70 Pac. 610, and the court said: "The object of the statute is to prevent gambling. Under its terms, one who plays for money in a game of poker is guilty of a misdemeanor, and subject to punishment under the statute. The statute fixes the minimum punishment at a fine of not less than two hundred dollars or punishment of not less than four months in the county jail. It is true that the statute does not fix the maximum punishment, but, as this court held in *State v. Mulkey*, 6 Idaho, 617, 59 Pac. 17, the maximum punishment is prescribed in section 6313 of the Revised Statutes."

The foregoing cases from this court are decisive of the point raised by petitioners. Section 1 of the act only attempts to fix the lightest penalty that the court may in any case impose, viz.: A fine of not less than \$200 or imprisonment of not less than four months. The court may let the prisoner off with either of the foregoing penalties, but nothing short of one of them will satisfy the statute. This statute, it will be observed, does not undertake to prohibit a heavier penalty than therein specified; its purpose is to prohibit a lighter penalty. For the maximum penalty this court has said we should look to section 6313 of the Revised Statutes. That is a general statute fixing the maximum penalty in misdemeanor cases where a maximum is not fixed by the act defining the offense, and under that statute the punishment may be "imprisonment in a county jail not exceeding six months, or by a fine not exceeding three hundred dollars, or by both." We are forced to the conclusion that under the statute as it has been interpreted by this court in two unanimous decisions, the maximum punishment which may be imposed on one convicted of gambling would be a fine of \$300 and imprisonment for six months. The sentence in this case was clearly within

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the limit, and within the jurisdiction of the court. The writ is dismissed and the prisoners are hereby remanded to the custody of the sheriff of Washington county.

Stockslager, C. J., and Sullivan, J., concur.

ON REHEARING.

SULLIVAN, J.—A petition for rehearing has been filed in this case, and counsel seems to place reliance on a stipulation in writing signed by opposing counsel granting an extension of the time in which to prepare and serve a proposed statement or bill of exceptions. Counsel contends that the attorneys for respondent had power to bind their clients in that stipulation. The trouble with this contention is that the stipulation signed by counsel cuts no figure in the case whatever. That was a stipulation granting the appellant ten days in which to prepare and serve a proposed statement or bill of exceptions. Counsel for appellant had, under the statute, ten days for that purpose, which time expired on the twenty-ninth day of December, 1904. Counsel thereafter procured an order of the court extending that time for sixty days from the twenty-third day of December, 1904. Counsel for appellant attempts to explain the order of the court and contends that it was intended to date from December 29th, instead of the 23d, 1904. The order speaks for itself and extends the time for sixty days from the 23d. The stipulation signed by respective counsel has no part whatever in the decision of this case. If counsel for appellant has made a mistake, that may be unfortunate, but under the facts of this case we cannot give him relief, and the petition for rehearing is denied.

Stockslager, C. J., and Ailshie, J., concur.

(March 3, 1906.)

JOHN TURMES, Respondent, v. WILLIAM KISNER, Appellant.

[85 Pac. 212.]

SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS AND JUDGMENT.

1. Evidence in this case examined and considered and held sufficient to support the findings and judgment.

(Syllabus by the court.)

APPEAL from the District Court of the Seventh Judicial District for Canyon County. Hon. George H. Stewart, Judge.

Action by plaintiff for an accounting of the business, effects and transactions of a partnership, and to recover amount due from a copartner. Judgment for plaintiff. Defendant's motion for a new trial denied, whereupon he appealed from the judgment and from the order denying his motion. *Affirmed.*

Frank Estabrook and Hawley, Puckett & Hawley, for Appellant, cite no authorities.

E. M. Wolfe and Richard Cunningham, for Respondent, cite no authorities,

AILSHIE, J.—This action was commenced by the plaintiff to secure an accounting and settlement of a partnership business carried on between plaintiff and defendant for a period of fifteen days. The court heard the proofs and found therefrom the amount of business transacted by the firm, the amount of property and cash contributed by each member to the partnership business and the amount received by each from the firm. The conclusion of the court's finding is that there is due from defendant to plaintiff the sum of \$360.44, and the court thereupon entered judgment in favor of plaintiff and against defendant for that sum, together with costs.

Points Decided.

The appeal is from the judgment and order denying a new trial.

Appellant complains of the insufficiency of the evidence to support the findings and judgment. Our examination of the evidence convinces us that there is such a substantial conflict in the material facts as to bring this case within the uniform rule of this court that where there is a substantial conflict in the evidence the judgment will not be disturbed. A statement of the evidence in this case can serve no useful purpose, and we will not therefore recite any of it here.

We find no error in the rulings of the court in the admission of evidence. Judgment affirmed, and costs awarded to respondent.

Stockslager, C. J., and Sullivan, J., concur.

(March 6, 1906.)

THEODORE SWANSON, Respondent, v. NIEL GROAT et al., Appellants.

[85 Pac. 384.]

JUDGMENT-ROLL — DAMAGES FOR TRESPASS—TRESPASS ON UNINCLOSED LANDS—TWO-MILE LIMIT LAW.

1. On an appeal from a judgment where no bill of exceptions or statement has been settled, a motion made in the trial court to strike from the complaint certain matter therein contained is not properly a part of the judgment-roll under section 4456 of the Revised Statutes, and cannot become a part of the record on appeal under the provisions of section 4818 of the Revised Statutes.

2. *Id.*—Where matter has been improperly inserted in the transcript on appeal, the same will be stricken from the record on motion of the adverse party.

3. Under the laws of this state, livestock, with certain exceptions, may run at large and roam and graze over and upon any of the uninclosed lands of the state, and the same will not amount to an actionable trespass against the owner of such livestock.

4. One who willfully, deliberately and knowingly drives his livestock upon the lands of another, whether inclosed or uninclosed,

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and holds, herds and grazes them upon such lands over the protests and objections of the owner, is liable in damages for the trespass.

(Syllabus by the court.)

APPEAL from the District Court of the Fifth Judicial District for Bannock County. Hon. Alfred Budge, Judge.

Action by plaintiff for the willful, deliberate and unlawful trespass in the herding and grazing their sheep upon the lands of the plaintiff, and within two miles of his dwelling-house. Judgment for plaintiff; defendants appeal. *Affirmed.*

Holzheimer & Holzheimer, for Appellants, cite no authorities on points decided by the court.

Standrod & Terrell, for Respondent.

The law provides for no appeal from an order overruling a demurrer, or an order on motion affecting the pleadings. (Code Civ. Proc., sec. 3573; *Ah Kle v. McLean*, 3 Idaho, 70, 26 Pac. 937.)

This being only an appeal from the judgment, the statutes fix what papers are to be used on the appeal. (Code Civ. Proc., sec. 3584.)

Section 3509, subsection 2, names the papers that constitute the judgment-roll in a case of this kind.

Motions and orders striking out or refusing to strike out any parts of the pleadings are no part of the judgment-roll. (*Graham v. Linehan*, 1 Idaho, 780; *Sutter v. San Francisco*, 36 Cal. 114; *Sharp v. Daugney*, 33 Cal. 513; *Feeley v. Shirley*, 43 Cal. 369; *Morris v. Angle*, 42 Cal. 240; *Ganceart v. Henry*, 98 Cal. 281, 33 Pac. 92; *Barber v. Mulford*, 117 Cal. 356, 49 Pac. 206; *Wilson v. Wilson*, 64 Cal. 92, 27 Pac. 861; *Hawley v. Kocher*, 123 Cal. 77, 55 Pac. 696.)

On appeal from a final judgment, if the record contains no bill of exceptions or statement, the case must be reviewed and decided upon the judgment-roll alone. (*Graham v. Linehan*, 1 Idaho, 780; *Gamble v. Dunwell*, 1 Idaho, 268; *Ray v. Ray*, 1 Idaho, 705; *Rich v. French*, 3 Idaho, 727, 35 Pac. 173;

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Stickney v. Hanrahan, 7 Idaho, 424, 63 Pac. 189; *Williams v. Boise Basin M. & D. Co.*, 11 Idaho, 233, 81 Pac. 646; *Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239; *Anderson v. Shoshone Co.*, 6 Idaho, 78, 53 Pac. 105; *Bank v. Sampson*, 7 Idaho, 564, 64 Pac. 890.)

The law is well settled that one who willfully, knowingly or purposely drives sheep upon the lands of another is liable in damages although the lands are uninclosed. (*Walker v. Bloomingcamp*, 34 Or. 391, 43 Pac. 175, 56 Pac. 809; *Lazarus v. Phelps*, 152 U. S. 81, 38 L. ed. 363, 14 Sup. Ct. Rep. 477; *Harrison v. Adamson*, 76 Iowa, 337, 41 N. W. 34; *Delaney v. Erickson*, 11 Neb. 533, 10 N. W. 451; *Powers v. Kindt*, 13 Kan. 74.)

The rule is well settled that error will not be presumed, but must affirmatively appear from the record. It does not appear from the record how much, if any, of the damages awarded was for the willful trespass upon the private lands or how much for the grazing upon public lands.

AILSHIE, J.—The respondent has filed and presented a motion to strike from the transcript in this case all matter found on page 6 thereof, which appears to be a motion and notice of motion to strike certain paragraphs from the complaint. This appeal is from the judgment only and no statement or bill of exceptions has ever been settled or filed in the case. It therefore follows that under sections 4456 and 4818 of the Revised Statutes, the motion and notice to strike certain matter from the complaint has no place in the judgment-roll, and could only be brought to this court by a bill of exceptions or statement. (*Williams v. Boise Basin M. & D. Co.*, 11 Idaho, 233, 81 Pac. 646; *Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189; *Graham v. Linehan*, 1 Idaho, 780; *Gamble v. Dunwell*, 1 Idaho, 268; *Ray v. Ray*, 1 Idaho, 705; *Taylor v. McCormick*, 7 Idaho, 524, 64 Pac. 239; *Anderson v. Shoshone Co.*, 6 Idaho, 76, 53 Pac. 105; *Bank v. Sampson*, 7 Idaho, 564, 64 Pac. 890.) The motion will be sustained and page 6, containing the matter designated, will be stricken from the transcript.

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After sustaining the foregoing motion, the case is left for the consideration of only one assignment of error, namely, that "the court erred in overruling the demurrer interposed by the appellants to respondent's amended complaint."

This action appears to have been instituted by the plaintiff under sections 1210 and 1211 of the Revised Statutes, commonly known in this state as the two-mile limit law. The defendants demurred to the complaint on the grounds that it "does not state facts sufficient to constitute a cause of action." Leaving the two-mile limit law entirely out of our consideration, we think the complaint states a cause of action against the defendants for a willful and unlawful trespass. In paragraph 3 of the complaint we find, among other things, the following allegations: "That on or about the seventeenth day of March, 1905, the said defendants willfully, knowingly and unlawfully drove their flock of sheep, about 2,500 in number, upon the lands of the plaintiff, and ever since said date, up to the twenty-second day of March, 1905, defendants continuously herded, held, pastured and grazed said sheep upon the lands of the plaintiff, and during the time aforesaid the defendants willfully, knowingly and unlawfully held, herded, fed, grazed and pastured said two thousand five hundred head of sheep upon the lands of the plaintiff and . . . against the will and without the consent of the plaintiff and over the plaintiff's protests and objections, and refused to drive said sheep away from said premises . . . until said defendants had fed and pastured to their said sheep all of the grass and feed upon said lands." The foregoing allegation is followed by the usual allegation as to the character and amount of damage sustained by reason of the unlawful acts of the defendant. While it is lawful in this state for livestock, with certain exceptions, to run at large and graze upon any of the uninclosed lands of the state, it is still true that one who willfully and deliberately drives his stock upon the lands of another, whether inclosed or uninclosed, and holds, herds and grazes them upon such lands over the "protests and objections" of the owner, is liable in damages for the trespass. Such willful, deliberate and intentional conduct cannot be

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justified upon the theory that the stock had a right of their own accord to roam over and graze upon such land. (*Harri-son v. Adamson*, 76 Iowa, 337, 41 N. W. 34; *Lazarus v. Phelps*, 152 U. S. 81, 38 L. ed. 363, 14 Sup. Ct. Rep. 474; *DeLaney v. Errickson*, 11 Neb. 533, 10 N. W. 451; *Powers v. Kindt*, 13 Kan. 74; *Larkin v. Taylor*, 5 Kan. 433; *Kerwhacker v. Cleveland etc. R. R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246; 12 Am. & Eng. Ency. of Law, 2d ed., 1044, 1045; *Walker v. Bloom-ingcamp*, 34 Or. 391, 43 Pac. 175; *St. Louis Cattle Co. v. Vaught*, 1 Tex. Civ. App. 388, 20 S. W. 855; *Willard v. Mathe-sus*, 7 Colo. 76, 1 Pac. 690.) The complaint stated a cause of action and the demurrer was properly overruled.

The greater portion of appellant's brief is devoted to a dis-cussion of what constitutes proper elements of damage that may be shown in a case prosecuted under sections 1210 and 1211 of the Revised Statutes. It is suggested that evidence was admitted tending to show the future value to plaintiff of public lands within two miles of his dwelling. The evi-dence, however, has not been brought up on this appeal, and we must therefore assume that only competent evidence was admitted.

The judgment is affirmed, with costs in favor of respond-ent.

Stockslager, C. J., and Sullivan, J., concur.

(March 8, 1906.)

C. E. CORKER, Appellant, v. JOHN PENCE, Respondent.

[85 Pac. 388.]

INFORMATION—REMOVAL FROM OFFICE—ALLEGATIONS ON INFORMATION OR BELIEF—CHARGING PART OF THE INFORMATION—CAUSES FOR REMOVAL—ILLEGAL FEES—NEGLECT TO PERFORM DUTY—EQUALI-ZATION OF ASSESSMENT—SANITARY RULES—ITEMIZED BILLS—VOUCHERS—BOARD—TRAVELING EXPENSES.

1. Under the provisions of section 7459 of the Revised Statutes, the allegations of the information should be made positively, when

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the facts are of record and accessible, or within the personal knowledge of the informant; otherwise they may be made on information and belief.

2. Under the provisions of section 7459 of the Revised Statutes, the information is sufficient if it charges the defendant with knowingly, willfully and intentionally charging and collecting illegal fees, specifying them, or with knowingly, willfully and intentionally refusing to perform, or neglecting to perform, an official duty pertaining to his office, specifying such duty.

3. Under the provisions of said section there are but two offenses for which a defendant may be removed from office; the first is the charging and collecting illegal fees for services rendered or to be rendered in his office; and, second, neglecting to perform official duties pertaining to his office required by law.

4. County officers, for all other willful or corrupt misconduct in office, other than that mentioned in section 7459, may be removed under the provisions of section 7445 et seq., of the Revised Statutes.

5. Under the provisions of section 7459, a corrupt official may be prosecuted by a private person for the acts therein specified, while under the provisions of section 7445 the accusation must be by the prosecuting attorney, or presented by the grand jury for other willful or corrupt misconduct in office.

6. Where a board of equalization meets and proceeds to equalize the assessment of the property of the county, but fails to make such equalization and assessment in accordance with the views of others, and if they willfully and corruptly equalize such assessments, they cannot be removed from office under the provisions of said section 7459. The remedy is provided by the provisions of section 7445.

7. The allegation in an information that the board of county commissioners did not make "necessary" and "proper" rules and regulations to prevent the outbreak and spread of contagious and infectious diseases, is not a sufficient allegation that no rules or regulations in regard thereto had been made.

8. A failure to properly itemize a claim against the county is not a cause for the removal of an officer under the provisions of said section 7459.

9. An allowance of a claim against the county without its being accompanied by a proper voucher is not a cause for removal under the provisions of section 7459.

10. Under the provisions of an act approved March 14, 1901 (Sess. Laws 1901, p. 227), which provides for the payment of actual and necessary expenses of certain county officers, is included the board of such officers when absent from their residences in the performance of the official duties of their several offices.

(Syllabus by the court.)

Argument for Respondent.

APPEAL from the District Court of the Fourth Judicial District for Elmore County. Hon. Lyttleton Price, Judge.

Proceeding to remove a county commissioner under the provisions of section 7459 of the Revised Statutes. Demurrer to complaint sustained by trial court. *Affirmed*.

W. C. Howie, for Appellant.

Where a statute confers upon a body or officer a power for the public good or protection, or in which the public is interested, the exercise of that power is mandatory. (20 Am. & Eng. Ency. of Law, 2d ed., 239-242; *Hays v. Simmons*, 6 Idaho, 651, 59 Pac. 182; *Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824; *Rankin v. Jauman*, 4 Idaho, 394, 39 Pac. 1111; *Stewart v. Bole*, 61 Neb. 193, 85 N. W. 33; *Clyne v. Bingham Co.*, 7 Idaho, 75, 60 Pac. 76; *Ellis v. Bingham County*, 7 Idaho, 86, 60 Pac. 79.) County officers have no right to charge their board as an expense while attending to official duties (*Stookey v. Board*, 6 Idaho, 542, 57 Pac. 312; *Reynolds v. Board*, 6 Idaho, 787, 59 Pac. 730; *Clyne v. Bingham Co.*, 7 Idaho, 75, 60 Pac. 76), and the act of 1901 does not give them that right.

E. M. Wolfe, Perky & Blaine and Morrison & Pence, for Respondent.

Section 7459 of the Revised Statutes is the sole basis of this action, and appellant must stand or fall upon the interpretation of that section. Unless fraud or intentional misconduct is charged, no cause of action is stated. (*Ponting v. Isaman*, 7 Idaho, 581, 65 Pac. 434; *Rankin v. Jauman*, 4 Idaho, 400, 39 Pac. 1111.)

The board of commissioners were acting in a judicial capacity, and were clothed with discretion. (*People v. Goldtree*, 44 Cal. 323; *Hornblower v. Duden*, 35 Cal. 664.)

The court should be reluctant to interfere, for errors of judgment and slight reasons, with the will of the people as expressed at the ballot box in the election of county officers. (*Gorman v. County Commissioners*, 1 Idaho, 559.)

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Absolute equality and strict justice are unattainable in tax proceedings. (Cooley's Constitutional Limitations, sec. 738.)

Powers of a board of health are to be liberally construed. (*Gregory v. New York*, 40 N. Y. 273; *Upjohns v. Board of Health*, 46 Mich. 542, 9 N. W. 845; 2 Am. & Eng. Ency of Law, 1st ed., 432.) The act of 1901, pages 226 and 227, provides for all "actual and necessary expenses." The purpose and intent of the legislature is the vital part of the law, and the primary rule of construction is to ascertain and give effect to that intent. (Sutherland on Statutory Construction, sec. 363.)

The allegations are upon information and belief. The informant in a matter of so much moment must be required to avail himself of all the facts at his command and allege positively upon them. (*First Nat. Bank v. Watts*, 7 Idaho, 510, 64 Pac. 223.) If an officer honestly enters upon the duties of his office, does the best he can but makes mistakes, he is not subject to removal from office and fine. (*Ponting v. Isaman*, 7 Idaho, 283, 62 Pac. 680, 65 Pac. 434; *In re Stow Park Commissioners*, 98 Cal. 587, 33 Pac. 490.)

SULLIVAN, J.—This action was brought under the provisions of section 7459 of the Revised Statutes, to remove the respondent from the office of county commissioner of Elmore county. Two separate causes of action are set out in the information. In the first cause, after alleging that appellant is a citizen and a taxpayer of the state of Idaho, and that respondent is one of the duly elected, qualified and acting county commissioners of said county, appellant alleges on information and belief that the respondent had, "willfully, knowingly and intentionally failed, neglected and refused to perform the official duties pertaining to his office." Then follow eight specifications of instances in which it is alleged he has so failed. The first specification refers to his action in conjunction with the other members of the board of county commissioners acting as a board of equalization, and states two matters in which it is alleged he knowingly, willfully and intentionally failed to perform the duties of his

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office: 1. That he failed, neglected and refused to equalize the taxes of said county for the year 1905; 2. That he failed, neglected and refused to enforce and compel an assessment of the property of said county at a fair cash value, but that he, in conjunction with the other members of said board, raised the valuation of the property of many of the taxpayers of the county to more than its fair cash value and to more than other property of the county of equal value, and more in proportion than other property of the county, and failed to raise others to their fair cash value, or to the same as other property of equal value, or to the same in proportion as other property of the county, and then particularly sets out the original assessments and the actions of respondent, acting and voting with the other members of the said board in regard to the lots in the original town-site of Mountainhome and Glenn's Ferry, and also two instances of contiguous ranch lands, with allegations of the nature of the said lots and the relative values thereof, and further alleges that the remainder of the lands of said county were as unequally assessed as those given, but alleges his inability at that time to give detailed facts of the same, and, by way of illustration of the matters alleged, attached copies of the plats of the said towns.

The second specification is that respondent failed to organize a board of health, and failed to make or establish any rules or regulations necessary and proper to prevent the spread of contagious or infectious diseases, and that there had repeatedly been cases of smallpox in the county requiring such rules and regulations.

The third specification alleges that there were several cases of smallpox at three different specified times and places in said county during respondent's term of office, their liability to spread and become epidemic, and that it was necessary that said cases be quarantined, and that in each case he failed to quarantine the case or to take any other legal steps to prevent the spread of such disease.

The remaining five specifications relate to the illegal allowance of bills, and ordering county warrants issued in payment thereof.

Specification 4 alleges that respondent allowed eight bills, amounting to \$362.45, for services and supplies in relation to smallpox patients, and that none of such claims were legal charges against the county, for the reason that they had not been authorized by any board or person having authority in the matter, and that they failed to perform their official duty in not rejecting and disallowing said claims.

Specifications 5, 6, 7 and 8 allege the allowance of various bills of county offices which were neither itemized nor accompanied by vouchers, alleging that he failed to perform the duties of his office in not rejecting said claims or in not requiring vouchers to be furnished therewith.

The second cause of action, after the formal allegations, alleges on information and belief that respondent has willfully, knowingly and intentionally been guilty of charging and collecting illegal fees for services rendered in his office in the following particulars, to wit: 1. That he did knowingly, willfully and intentionally present to the board of county commissioners of said county at their July, 1905, meeting, a claim for board while acting as a member of such board of commissioners, amounting to the sum of \$6, which said claim was verified according to law, thereafter allowed by said board, and a county warrant ordered to be drawn and issued therefor to the respondent, and that respondent did knowingly, willfully and intentionally accept and receive said county warrant. Then follows a prayer that a citation issue, and upon a return thereof the court proceed to consider this information and the evidence in support thereof, and that the judgment be entered depriving the respondent of his said office and in favor of appellant for the sum of \$500 and costs, and such further relief as to the court shall seem proper. To that information the respondent filed a demurrer on the following grounds:

“(1) That several causes of action have been improperly united, to wit: That such complainant informs against the defendant as a member of the board of equalization, and

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in the same count alleges against him as a member of the board of county commissioners.

“(2) That the first cause of action in the said complaint is ambiguous, unintelligible and uncertain: 1. That it is ambiguous for the following reasons, to wit: (a) That it cannot be determined from paragraph 3 in the first cause of action whether informant alleges against the defendant as member of the board of county commissioners or as a member of the board of equalization; (b) It cannot be determined from subdivisions 2 and 4 of the complaint and from the complaint at all whether the allegations are made against the defendant as member of the board of county commissioners or as a board of health, or both or at all; (c) It is alleged that defendant refused to equalize the assessment of Elmore county and immediately following said allegations proceeds to set out in detail the action of the defendant in equalizing the said assessment; (d) It is alleged that defendant failed as a member of said board to compel an assessment of the said property set out in the complaint at its full cash value, and in the same paragraph alleges in detail the action of the defendant as a member of said board, the assessment at certain values therein set out. (3) That the second cause of action set out in plaintiff's complaint does not state facts sufficient to constitute a cause of action. Also, second, that the first cause in the said complaint does not state facts sufficient to constitute a cause of action.”

A motion to strike was also interposed moving to strike out all of the specifications of the first cause of action as frivolous, for the reason that they were alleged on information and belief, and also to strike out all the specifications of the second cause of action on the grounds that the court had no jurisdiction of such matter, and that the charges could not be considered by the court; that if any cause of action existed it was under sections 7445 and 7447 of the Revised Statutes. The cause came on for hearing on said demurrer and motion and the court sustained both the demurrer and motion. Thereupon appellant refused to plead

further, and judgment of dismissal was entered. This appeal is from that judgment.

As the motion to strike and the demurrer are based largely on the same grounds, we will dispose of them both together. One of the points raised is that an information under the provisions of section 7459 of the Revised Statutes cannot be made on information or belief. That point appears in the case of *Hays v. Simmons*, 6 Idaho, 651, 59 Pac. 182, and the information in that case was based wholly on information and belief. If facts set forth in the information are matters of record and accessible, or within the personal knowledge of the informer, the allegations should be made positively, and not on information and belief; otherwise the allegations may be made on information and belief. The effect of most of the objections made by the motion and demurrer is that the information does not state facts sufficient to constitute a cause of action under the provisions of said section 7459, *supra*, which is as follows: "When an information in writing verified by the oath of any person is presented to a district court, alleging that an officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the information was presented, and on that day, or some other subsequent day, not more than twenty days from that on which the information was presented, must proceed to hear, in a summary manner, the information and evidence offered in support of the same and the answer and evidence offered by the party informed against; and if, on such hearing, it appears that the charge is sustained, the court must enter a decree that the party informed against be deprived of his office, and must enter a judgment for \$500 in favor of the informer and such costs as are allowed in civil cases." The information must contain language sufficient to charge the defendant with being guilty of charging and collecting illegal fees for

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services rendered or to be rendered in his office, or language sufficient to charge him with refusing or neglecting to perform official duties pertaining to his office. The information charges that the defendant "willfully, knowingly and intentionally failed, neglected and refused to perform the official duties pertaining to his office in the following particulars, to wit." Then follows a number of specifications of particulars. It is contended by counsel for respondents that under the provisions of said section the defendant must be charged with something more than "knowingly, willfully and intentionally" doing something, as doing a thing "knowingly, willfully and intentionally" does not imply guilt, and that said statute declares that the defendant must be guilty of doing the thing or things therein charged. There is nothing in that contention, for if an officer is accused of knowingly, willfully and intentionally charging and collecting an illegal fee, that clearly charges his guilt and his unfaithfulness in office, and if he is charged with knowingly, willfully and intentionally refusing to perform or neglecting to perform an official duty pertaining to his office, that is a sufficient allegation of unfaithfulness in office. The allegation "that the defendant knowingly, willfully and intentionally charged and collected illegal fees," must be followed by a specification of the particular fee claimed to be illegal, or if he is so charged with refusing or neglecting to perform an official duty, that particular official duty must be specified and alleged in the information. Such allegations convey the idea that the officer informed against is accused of having charged and collected illegal fees knowing them to be illegal, and is accused with refusal and neglect to perform official duties pertaining to his office. Under the provisions of said section there are only two things for which a defendant may be prosecuted and removed from office. The first is charging and collecting illegal fees for services rendered or to be rendered in his office; and, second, neglect to perform official duties pertaining to his office. Proceedings for removal for the causes therein mentioned may be initiated by a private person. No proceedings can be maintained against an officer for any other kind of misconduct in office than the

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two kinds mentioned therein under the provisions of said section. The proceedings for the removal of officers for all other willful or corrupt misconduct are provided by section 7445, et seq., of the Revised Statutes, and the accusation must be by the prosecuting attorney, or presented by the grand jury.

Certain allegations of refusal or neglect to perform official duty are in regard to the failure of the defendant acting as a member of the board of equalization, in that said board neglected to equalize the assessment of the property of the said county, and particularly of the property in the towns of Mountainhome and Glenn's Ferry, and that board is also charged with having failed and neglected to enforce and compel an assessment of the property within their county at its fair cash value. Numerous instances are set forth in the information wherein it is alleged they failed to equalize the assessment of the property in said county and where they failed to assess such property at its fair cash value. It is also shown that the board of equalization did meet as such board and undertook to equalize the assessments, and if the allegations in the information are true, which for the purposes of this appeal must be taken as true, they show that such assessments and equalizations were not such as were contemplated by the law. While absolute equality and justice are unattainable in the equalization of assessments and in the assessment of property, the allegations would indicate that the board came about as far from equalizing assessments and assessing the property of their county at its fair cash value as could have been done. But the allegations show that the board of equalization did meet and act. That being true, they did not neglect or refuse to act as such board. If they acted corruptly in the equalization of assessments, they could not be removed from office under the provisions of section 7459. The provisions of section 7445 were intended to meet that class of misconduct.

The defendant is accused of knowingly, intentionally and willfully, as a member of the board of commissioners, neglect-

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ing and refusing to make or establish for Elmore county sanitary rules and regulations to prevent the spread of contagious or infectious diseases. Section 1151 of the Revised Statutes, as amended by Session Laws of 1903, page 365, provides that the board of health must make such sanitary rules and regulations "as they may deem necessary and proper to prevent the outbreak and spread of dangerous, contagious and infectious diseases." It has been held that the powers of boards of health as imposed by statute are to be liberally construed, and it is not alleged or shown but what the board of health that preceded the present board had established rules and regulations. And the board of which respondent is a member, in all probability, continued to act under the former rules and regulations established by the predecessor board. The board of health is a continuing body and its rules and regulations continue until supplanted by new ones, and in the absence of any allegation that no rules had been adopted by the predecessor board, the presumption is that such board had adopted rules and regulations, and that the present board had continued to operate under them.

It is alleged that the board failed to organize a board of health. Under the provisions of section 1150 of the Revised Statutes, as amended by the laws of 1903, page 364, the board of county commissioners are required to appoint an experienced and skillful physician, and that such physician, together with the board of county commissioners, constitute the board of health, and such board continues until their successors are appointed and qualified. That completes the organization.

It is alleged that said board refused to make or establish any sanitary rules and regulations necessary and proper to prevent the outbreak or spread of contagious, etc., diseases. That allegation would clearly indicate that some rules or regulations had been made for that purpose, and that the informant did not deem them "necessary" and "proper" to prevent the outbreak or spread of such diseases, or that such rules did not meet the approval of the informer. The allegations on this point are not sufficient, and do not state a

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cause of action against respondent under the provisions of said section 7459.

The remaining specifications of the information relate to the action of the respondent in connection with the other members of the board of county commissioners in allowing certain bills to himself and other persons. It is alleged that certain bills were allowed which were "not properly itemized and were not accompanied by any vouchers." And it is contended that as the law requires bills to be itemized and vouchers furnished therewith, the defendant had failed and neglected to disallow said bills and thus violated his official duty. The provisions of section 773 of the Revised Statutes provide that the commissioners must not hear or consider any claim in favor of an individual against the county, unless upon an account properly made out, giving all the items of the claim, etc. Now, under that section an allegation that a claim was not "properly" itemized is not sufficient. It is not sufficient to show that the bills did not give "all items of the claim." It is also alleged that proper vouchers did not accompany said bills or claims, such vouchers as are required by the provisions of section 1763 of the Revised Statutes, as amended by Session Laws of 1899, page 405. The failure to properly itemize a claim or to furnish vouchers therewith is not a cause for the removal of an officer under the provisions of said section 7459. It is not a neglect or refusal to perform an official duty under the provisions of said section. It is not a charging or collecting of illegal fees for services rendered or to be rendered. Corrupt or willful allowance of illegal claims by the county commissioners may be reached by proceedings under section 7445 or by appeal, but not by proceedings under the provisions of section 7459.

In the second cause of action the informer alleges the collection of illegal fees by the respondent, in that he presented a claim for \$6 for board while attending meetings of the board. In *Stookey v. Board*, 6 Idaho, 542, 57 Pac. 312, *Reynolds v. Board*, 6 Idaho, 787, 59 Pac. 730, *Clyne v. Bingham County*, 7 Idaho, 75, 60 Pac. 76, this court held that an officer was not entitled to compensation for his board. In 1901, after the

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above cases had been decided by this court, the legislature by an act approved March 14, 1901 (Sess. Laws 1901, p. 227), defines "actual and necessary expenses," and includes therein all traveling expenses incurred by any county officer when absent from his residence in the performance of duties of his office. This was clearly intended to allow to the officers their board when absent from their residence in the performance of the duties of their office. That being true, the board was authorized to allow the respondent his claim for board when absent from his residence in the performance of his official duties. It is clear to the court that if the respondent is liable to removal from office under any of the charges made in the information, he must be proceeded against under the provisions of section 7445, and not under the provisions of section 7459.

The views herein expressed in no wise conflict with the conclusions reached in *Rankin v. Jauman*, 4 Idaho, 53 and 394, 36 Pac. 502, 39 Pac. 1111, *Hays v. Simmons*, 6 Idaho, 651, 59 Pac. 182, *Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824, or *Ponting v. Isaman*, 7 Idaho, 581, 65 Pac. 434. The judgment of the trial court is affirmed, with costs in favor of respondent.

Stockslager, C. J., and Ailshie, J., concur.

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(March 8, 1906.)

C. E. CORKER, Appellant v. W. L. WARD, Respondent.
C. E. CORKER, Appellant, v. S. W. ELLIOTT, Respondent.

[85 Pac. 392.]

APPEALS from the District Court of Fourth Judicial District for Elmore County. Hon. Lyttleton Price, Judge.

The facts in the above cases are substantially the same as in the case of *Corker v. Pence*, ante, p. 152.

W. C. Howie, for Appellant.

E. M. Wolfe, Perky & Blaine and Morrison & Pence, for Respondents.

SULLIVAN, J.—By stipulation, the above-entitled cases were submitted with the case of *C. E. Corker, Appellant, v. John Pence, Respondent*, ante, p. 152, 85 Pac. 388, and were to abide the decision of this court in that case. On the authority of that case the judgment of the trial court is affirmed in each of said cases, with costs in favor of the respondents.

Stockslager, C. J., and Ailshie, J., concur.

Argument for Appellant.

(March 8, 1906.)

PETER BROWN, Respondent, v. WM. W. NEWELL, Appellant.

[85 Pac. 388.]

WATER RIGHT—DIVERSION AND APPROPRIATION—TRANSFER OF POSSESSION AND TITLE—CONTINUITY OF TITLE.

1. Where H. in 1899 settled on unsurveyed public lands and opened up an old ditch which had been constructed and used by a previous settler, and put in a headgate and conveyed the waters of a stream one hundred and fifty feet to and upon the lands claimed by him, and in the following year extended the ditch so as to better distribute the water over his claim, the water right so acquired is entitled to date from the time when the water was actually delivered upon the ground for the use of which it was diverted.

2. Where B. entered into an agreement and contract with H. for the purchase of a claim or squatter's right on unsurveyed lands of the United States, and the ditch and water right belonging thereto and used therewith, and paid a part of the purchase price, and was thereupon let into possession which he held continuously thereafter, and two years later received a deed from H. for such property, B.'s chain of title will not be broken by such contract and change of possession so as to allow an intervening appropriator a priority over B.'s water right.

3. Question as to power of the trial court to reopen a case for the introduction of further evidence after adjournment of the term at which the case was tried and submitted, reserved.

(Syllabus by the court.)

APPEAL from District Court of Fourth Judicial District for Elmore County. Hon. Lyttleton Price, Judge.

Defendant appealed from the judgment and order denying the motion for a new trial. *Affirmed.*

Wyman & Wyman, for Appellant Newell.

A water right may be acquired without any compliance whatever with the statutes relating to the location of water. "A person deciding to appropriate the waters of a stream may do so either by actually diverting the water and applying it to a beneficial purpose, or he may pursue the statutory methods

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by posting and recording his notice, then commencing and prosecuting his work within the statutory time." (*Sand Point W. & L. Co. v. Panhandle D. Co.*, 11 Idaho, 405, 83 Pac. 347.) "When an appropriator of water does not post and file notice of location as provided by law, his right only dates from the last act perfecting such appropriation." (*Pyke v. Burnside*, 8 Idaho, 487, 69 Pac. 477.)

The purpose and object of the legislature was merely to define with precision the conditions upon which the appropriator of water could have the advantage of the familiar doctrine of relation. (*De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; *Murray v. Tingley*, 20 Mont. 260, 50 Pac. 723; Farnham on Water Rights, sec. 663.)

As between two appropriators, neither of whom has complied with the statutes requiring the posting and recording of the notice of appropriation, the one who has his ditch completed and the water flowing over his land first has the superior right, notwithstanding the other first commenced work on his ditch. (17 Am. & Eng. Ency. of Law, 498; Long on Irrigation, 72.)

A statute as to notice is to be construed strictly and rights can be acquired under it only by strict compliance with its terms. (Long on Irrigation, secs. 37, 51; *Taylor v. Abbott*, 103 Cal. 421, 37 Pac. 408; 17 Am. & Eng. Ency. of Law, 502; *Murray v. Tingley*, *supra*; *Umatilla I. Co. v. Barnhart*, 22 Or. 366, 30 Pac. 30 (37).)

Respondent's grantor had been out of possession for more than two years when he gave the deed. This is the exact condition of fact that existed in the case of *McGinnis v. Stanfield*, 6 Idaho, 372, 55 Pac. 1020, where this court held such deed to be without effect.

Before secondary evidence can be introduced, it must be shown that a diligent and unsuccessful search was made for the document. (25 Am. & Eng. Ency. of Law, 165.) A deed or other instrument deposited as an escrow is nothing more than a mere scroll until the condition is fully performed or the contingency happens upon the faith of which it was deposited; and this being so, no title passes prior to that time

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without the grantor's consent. (11 Am. & Eng. Ency. of Law, 348, 349.)

E. M. Wolfe, for Respondent.

A person may add from year to year acreage to his cultivated land, and increase his application of water thereto for irrigation as his necessities may demand or as his abilities permit, until he has put to a beneficial use the entire amount of water at first diverted by him and conducted to the point of intended use. (*Conant v. Jones*, 3 Idaho, 606, 32 Pac. 250; *Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19.)

The deed of respondent's grantor conveyed all of his interest in the property described to respondent. (*Day v. Cohn*, 65 Cal. 508, 4 Pac. 511.)

STATEMENT OF FACTS.

This is a contest between two appropriators and users of the waters of Deer Creek in Elmore county. It appears from the evidence that Richard Horton, the predecessor in interest of the plaintiff, settled upon unsurveyed government land on Smith's prairie, in Elmore county, about August 1, 1899. Horton testified on behalf of the plaintiff as follows: 'I went upon the land belonging to the plaintiff about August 1, 1899. That fall I cleaned out what ditch there was dug there—that is, a little—and ran it down through there, and then went on with the survey, and found out that the ditch was an old survey by Peterson, who had been on the ground before I went there, was too high. I resurveyed it and cut out some brush, and then winter was on, and I went down to Highland valley and stayed that winter. Within one hundred and fifty feet of the headgate the ditch struck the line of my land. The water was running in that ditch when I went there. I cleaned it out, and had a little more put into it, before I left that fall. I cut between twenty-five and thirty acres of hay, in 1900, and had about one-half of an acre in garden, and a little patch of wheat for a trial patch. There was no person on the Newell lands when I went there. I im-

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proved the land during the summer of 1900, and also irrigated it and cut hay from it in 1901. Mr. Pierce cut the hay that year. In 1902, I sold to the plaintiff Brown. I judge that the ditch would carry two hundred inches after I cleaned it out in the fall of 1899. In 1900 and 1901, I used all of the water of the creek along in July and August.

"The man who was on the land before me had abandoned it. I put in a headgate and cleaned out the ditch a little. It was a little over one hundred feet long when I went there. I put in a small headgate made of old drygoods boxes and one thing and another. I made a sort of temporary gate—done well enough; I took a couple of hours to make it and put it in. It took me about one-half day to clean out the ditch, using pick and shovel. That ditch ends right in the field, a little draw that runs down onto the place. I went on the ground some time in August, and the work above mentioned was done about two months later. I left the property in December. The survey ran too high—either on a dead level or up. The water has been running in that ditch ever since I turned it in in the fall. It is running in there now. From the end of that ditch I commenced my survey. I used that portion of it dug. I began constructing the ditch next spring, the latter end of April, and worked on and off all the time till I got it done, up into the latter end of June. I had water running in on that place—I got the ditch dug the latter end of June, 1900. The hay on the place is wild hay. I sold to plaintiff May 20, 1902. He took possession at that time. I used all the water there was in the creek during July and August of 1900 and 1901."

The plaintiff Brown testified that he took possession of the land on May 20, 1902, receiving possession from Horton; that he had a written agreement with Horton which was left in escrow with one Baker. That Baker thereafter died, and that plaintiff, prior to the trial, made inquiry of Baker's wife concerning this escrow, and that she could not find it, and that he (plaintiff) did not know the whereabouts of that agreement or contract. He further testified that by virtue of the contract or agreement, Horton conveyed the land and water right in

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question to the plaintiff, and that plaintiff had paid the sum of \$40 on the purchase price at the time the agreement was made and possession delivered. On June 2, 1904, Horton executed and delivered to plaintiff a deed for the land and water right described in the complaint, whereby he conveyed all of his rights, title and interest in and to the property in question. Plaintiff continued to cultivate and irrigate the land from the time of his purchase from Horton until the trial of this case.

On May 9, 1900, the defendant Newell settled on a part of the unsurveyed public domain which now belongs to him. Two days previous to that time, his brother, who claimed to be a partner, had made settlement, and commenced to open up an old ditch, and within a couple days the two completed the ditch and turned water through it and onto their land, and have continued ever since to use the water in the irrigation of their land. Defendant is the successor by purchase to all the interest of his brother. At the trial, after the plaintiff had shown the settlement, appropriation and diversion by his predecessor and grantor, Horton, and his purchase from Horton, and entry into possession, and subsequent use and application of the water, he offered to prove the nature of the agreement entered into between him and Horton at the time he took possession. The defendant objected on the grounds that it was not the best evidence, and plaintiff had not shown diligence in his effort to produce the original contract which was in writing. The district court appears to have ruled with the defendant upon this objection, and thereupon the defendant introduced evidence showing his settlement, and also his appropriation and diversion of the waters of Deer creek. The case appears to have been closed and submitted to the court on November 3, 1904, with the understanding that briefs were to be furnished by the respective counsel within ten days thereafter. The court immediately adjourned the term. No briefs were furnished by either side, but on the tenth day of December, the plaintiff filed and served a motion to reopen the case and allow him to introduce the written instrument which had been entered into and executed by Richard Horton to the

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plaintiff on the twenty-first day of May, 1902. This motion was supported by the evidence of Mrs. N. J. Nauwerth, who was, at the time the agreement was executed, the wife of L. B. Baker, the holder of the escrow. Thereafter, and at the February, 1905, term of the court, plaintiff's motion to reopen the case was heard upon the affidavit and agreement which was sought to be introduced, and the motion was granted by the court over the objection of defendant, and thereafter the case was called for hearing further evidence, and the agreement was offered in evidence by the plaintiff and admitted by the court, and is as follows:

"Smith's Prairie, Ida., May 21, 1902.

"ARTICLE OF AGREEMENT.

"This article of agreement, by and between R. Horton, of Smith's Prairie, Elmore County, Idaho, party of the first part, and Peter Brown, of the same place, party of the second part, witnesseth, that for the consideration of three hundred (\$300) dollars, that the said R. Horton, bargains, sells and by these presents does convey to the said Peter Brown, all his rights, title and interest to a piece of land, known as the 'Buckley Ranch,' situated on Deer Creek, Smith Prairie, Elmore County, Idaho, together with all appurtenances belonging thereto. The considerations wherein the said party of the first part conveys and quitclaims the above-described property, are that the party of the second part, in payment thereof turns over to the party of the first part, one chestnut sorrel mare, age six years, branded with ———, on left shoulder, white strip in face, weight about 900 pounds; also one saddle mare and saddle, valued at forty dollars, also July 31st, 1902, the party of the second part is to pay the party of the first part, one hundred dollars (\$100); also on October 25, 1902, the party of the second part is to pay to the party of the first part one hundred and sixty (\$160) dollars.

"RICHARD HORTON,

"PETER BROWN.

"Witness:

"L. B. BAKER,

"M. J. BAKER."

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The case was finally submitted to the court, and he thereupon made and filed his findings of fact and conclusions of law. The court found that the plaintiff is entitled to a water right of one hundred and fifty inches from Deer creek, to date from March 28, 1900, and that defendant is entitled to a right of one hundred and fifty inches to date from May 12, 1900. The court appears to have found that plaintiff's appropriation should date from the posting of his notice of water location. Judgment was entered decreeing the rights and priorities of plaintiff and defendant in accordance with the findings. Defendant Newell has appealed from the judgment and order denying the motion for a new trial.

AILSHIE, J. (After stating the facts.)—It is contended by appellant that the acts of diversion and appropriation done by Horton in 1899 did not amount to an actual appropriation. It clearly appears from the evidence that the ditch was opened in the fall of 1899, and a headgate was put in and the water, to the amount of two hundred inches, was actually delivered on the Horton claim. These acts were followed up the next year by extending the ditch so as to more completely distribute the water over the entire claim, and this in turn was followed by cultivation of a larger acreage of the claim. We think the facts bring this case within the well-established rules of law both as to what constitutes an appropriation as well as the reasonable time in which the appropriator may apply the water to the intended use. (*Conant v. Jones*, 3 Idaho, 606, 32 Pac. 250; *Pyke v. Burnside*, 8 Idaho, 487, 69 Pac. 477; *Sandpoint W. D. L. Co. v. Panhandle D. Co.*, 11 Idaho, 405, 83 Pac. 347.)

Appellant further contends that the deed of June 2, 1904, from Horton to respondent Brown did not pass sufficient title to a possession with which he had parted some two years previously, so as to entitle the water right to date from the original diversion and appropriation by Horton. In support of this position appellant relies on the case of *McGinnis v. Stanfield*, 6 Idaho, 372, 55 Pac. 1020. That case differed from this in some respects. Here it clearly appears that Brown's pos-

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session was obtained from Horton by contract of purchase, and that a part of the purchase price was paid at the time. It is clear that if the balance of the purchase price was thereafter paid, that Brown became the equitable owner and entitled to a conveyance, and that a court of equity would have so decreed, in which case the chain of title to the ditch and water right would have been continuous and complete from the perfecting of Horton's right. If a court of equity would enforce a conveyance, it must follow that a voluntary conveyance made by the grantor under the same state of facts would convey as good a title as the court could decree. On the other hand, if the purchase price was never paid by Brown in accordance with the contract, the title (except as against the government) remained in Horton, and Brown's possession remained, in contemplation of law, the possession of Horton. In either view of the case the water right was entitled to date from the original appropriation and application thereof by Horton.

For the foregoing reasons it is unnecessary for us to consider the validity of the water right notice and claim posted by Horton on March 28, 1900, or of the subsequent steps taken by him under that notice in his endeavor to comply with the law. The actual diversion and application of the water had preceded that date, and it therefore becomes unnecessary for us to consider the steps taken in regard to the posting and recording the notice and the prosecution of work thereafter.

Appellant complains of the action of the court in reopening the case and permitting the plaintiff to introduce the contract, agreement or conveyance of May 21, 1902, which had been placed in escrow with Baker by Horton and Brown. Without passing upon the question as to the right of the trial court to reopen a case after the adjournment of the term at which it was tried (a question the consideration of which we specifically reserve in this case), we are content to rest our decision on the point that it clearly appears in this case that the defendant was in no manner injured or prejudiced by the action of the court in this respect. It appears that upon the trial of the case the defendant had notice of the nature and character

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of the agreement or contract, and that when it was actually produced in evidence it only confirmed the position taken and evidence previously produced by the plaintiff. The title had already passed by deed of June 2, 1904, which was in evidence. As stated above, we do not think anything we have said in this case is in conflict with the McGinnis-Stanfield case, but if it should be so understood, then it is the purpose of this decision to overrule anything contained in that case in conflict with what we have herein said.

The judgment of the lower court will be affirmed, and it is so ordered. Costs in favor of respondent.

Stockslager, C. J., and Sullivan, J., concur.

(March 8, 1906.)

STATE, Respondent, v. PETER A. STEERS, Appellant.

[85 Pac. 104.]

EMBEZZLEMENT BY COUNTY OFFICER—WHEN INFORMATION SUFFICIENT TO CHARGE—PAYMENT TO SHERIFF OF MONEY FOR RETAIL LIQUOR DEALER'S LICENSE—HIS DUTY—INSTRUCTIONS TO JURY AS TO CAUSE OF EMBEZZLEMENT—WHEN NOT ERROR TO REFUSE TO GIVE REQUESTS TO APPELLANT—EMPLOYMENT OF PRIVATE COUNSEL.

1. The crime of embezzlement is committed by an officer of any county, city or municipal corporation of this state when he fraudulently appropriates to his own use any money or property which he has in his possession or under his control by virtue of his trust as such officer. (Rev. Stats., secs. 7065, 7066.)

2. An information that charges a sheriff of a county of this state with willfully, unlawfully, fraudulently and feloniously appropriating to his own use certain money paid to him in his official capacity is sufficient under the provisions of sections 7065, 7066, *supra*.

3. Attorneys other than the attorney general in this court, or the county attorney in the lower court, may assist in the prosecution by and with the consent of the prosecuting officer, and it is not error to allow such appearance in the trial court.

4. When the court on its own motion has fully and fairly instructed the jury on all the essential elements constituting the

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crime of embezzlement, it is not error to refuse requests for instructions by counsel for appellant.

5. Instructions in this case examined, and no error appearing. *Held*, sufficient to sustain the judgment.

(Syllabus by the court.)

APPEAL from District Court of the Fifth Judicial District for Bannock County. Hon. Alfred Budge, Judge.

Appellant was convicted of the crime of embezzlement and sentenced to a term of two and one-half years in the state penitentiary. *Judgment affirmed*.

Bowen & Watson and S. C. Winters, for Appellant.

The demurrer to the information should have been sustained, as it does not state whether the money claimed to have been embezzled was the property of Bingham county or of E. C. Shearer, or of whom, and does not in any manner comply with sections 7677, 7678 of the Revised Statutes.

The court should have sustained the objection of defendant to the appearance of Standrod & Terrell, as counsel for the state, as there is no law authorizing such appearance by private counsel in criminal actions, and it is against public policy. (*Conger v. Board of County Commrs.*, 5 Idaho, 347, 48 Pac. 1064.)

The requested instruction at folios 293, 294, should have been given as going to the intent, and in connection with the other requested instructions whether or not he was justifiable in his acts; otherwise it would make no difference as to the good faith of an act. (*People v. Weslake*, 124 Cal. 452, 57 Pac. 465.)

J. J. Guheen, Attorney General, Edwin Snow, R. M. McCracken, County Attorney, and Standrod & Terrell, for Respondent.

The information states the facts and circumstances which go to make up the offense defined by the statute. (Rev. Stats., 7065, 7066; *Brady v. Territory*, 7 Ariz. 12, 60 Pac. 698; *People v. Cobler*, 108 Cal. 538, 41 Pac. 401; *People v.*

Argument for Respondent.

Jose De La Guerra, 31 Cal. 416; *People v. Gray*, 66 Cal. 271, 5 Pac. 240.)

Applications for the postponement of the trial of an action are addressed largely to the discretion of the trial court, and it is only in those cases where the discretion has been abused that the supreme court will review such action. (*People v. Walter*, 1 Idaho, 386; *State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061; *State v. Rice*, 7 Idaho, 762, 66 Pac. 87; *State v. Rooke*, 10 Idaho, 388, 79 Pac. 82; *State v. Wetter*, 11 Idaho, 433, 83 Pac. 341.)

The next point discussed by counsel for appellant, while it is not assigned as one of the numerous errors relied upon "in their order," is that the court permitted Standrod & Terrell, attorneys in the trial court, to assist in the prosecution of the case. The question of attorneys other than the prosecuting officer assisting in the prosecution has been well settled by this court. (*State v. Crump*, 5 Idaho, 166, 47 Pac. 814; *People v. Biles*, 2 Idaho, 114, 6 Pac. 120; *State v. Williams*, 4 Idaho, 502, 42 Pac. 511; *People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; *Territory v. Catton* (*People v. Catton*), 5 Utah, 451, 16 Pac. 902; *People v. Tidwell*, 4 Utah, 506, 12 Pac. 61.)

Proof of similar acts is proper proof of intent. (*People v. Gray*, 66 Cal. 271, 5 Pac. 240; 5 Ency. of Ev. 240.)

The law makes it the duty of the sheriff to collect liquor licenses. (Rev. Stats., sec. 2157; *State v. McDonald*, 4 Idaho. 468, 40 Pac. 312; Murfree on Official Bonds, sec. 193.) No demand by the successor of the appellant Steers is necessary, nor is such demand necessary to be made by the county. (*Hollingsworth v. State*, 111 Ind. 289, 12 N. E. 490; *State v. Ring*, 29 Minn. 78, 11 N. W. 233; *State v. Czizek*, 38 Minn. 192, 36 N. W. 457.) The mere failure of a public officer to turn over and account for public money is *prima facie* evidence of embezzlement. (*Fleener v. State*, 58 Ark. 98, 23 S. W. 1.)

Failure to account at the proper time is embezzlement. (5 Ency. of Ev. 144, notes.) Even if the moneys had been illegally collected by Steers, he having collected them under

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color of office, he should have paid them into the county treasury, and they did not belong to him in any view, and he had no right to retain them. (*Perry v. Irrigation Dist.*, 127 Cal. 565, 60 Pac. 40-42; *People v. Van Ness*, 79 Cal. 84, 12 Am. St. Rep. 134, 21 Pac. 554.) A public officer cannot dispute the right of the county to the money collected in his official capacity. (*Placer Co. v. Ashton*, 8 Cal. 303; *People v. Jenkins*, 17 Cal. 500; *McKee v. Monterey County*, 51 Cal. 275.

STOCKSLAGER, C. J.—The prosecuting attorney of Bingham county charged appellant with the crime of embezzlement; the charging part of the information is as follows: The said Peter A. Steers, at and within Bingham county and state of Idaho, and within three years prior to the filing of this information, being then and there an officer of Bingham county, state of Idaho, charged by law with the receipt, safekeeping and transfer of public moneys, to wit: The sheriff in and for Bingham county, state of Idaho, and by virtue of his said office, then and there a receiver of public moneys, to wit, a collector of licenses or license taxes, and authorized by law to receive said moneys, and then and there acting as such officer, did then and there willfully, unlawfully, fraudulently and feloniously, without authority of law, appropriate to a use and purpose not in the due and lawful execution of his trust, to wit, to his own use, certain money paid to and received by him while acting in his official capacity as said sheriff, to wit, the sum of \$500, lawful money, the same being so paid to and received by him for said Bingham county, state of Idaho, by and from E. C. Shearer on or about the twenty-third day of May, 1904, for a license to sell spirituous, vinous, malt and intoxicating liquors within Bingham county, state of Idaho. To this information a demurrer was filed, to wit: "1. The facts therein stated do not constitute a public offense. 2. Said information does not substantially conform to the legal requirements of sections 7677, 7678 and 7679 of the Revised Statutes of Idaho, particularly in this, to wit: (a) Said information does not con-

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tain a statement of the acts constituting the offense attempted to be charged in such manner as to enable a person of common understanding to know what is intended. (b) It does not state either specifically or approximately the date of the commission of the alleged crime. (c) It is not direct or certain in stating the time of the commission of the offense or in stating whether or not said offense was committed while the defendant was sheriff of Bingham county, Idaho, or in stating whether or not the \$500 referred to therein ever belonged to or was the property of said Bingham county, or whether said \$500 was at the time of its alleged misappropriation the property of the person named in said information as being the person who paid said money to the defendant. Nor is said information direct or certain in stating that the said five hundred dollars or any part thereof was ever in the possession of the defendant or under his control by virtue of any trust or of his official position as sheriff of said Bingham county. Nor is said information direct or certain in stating whether or not any license was ever issued or granted by said Bingham county to said person who is alleged to have paid said \$500 to the defendant, or whether a license was refused or denied. 3. In the respects stated in subdivision c of the foregoing paragraph 2, said information does not clearly and distinctly set forth the act or omission charged as the offense."

In the minutes of the court of date April 19, 1905, it is shown that a motion to set aside the information was submitted to the court and overruled and on the same day the demurrer was overruled. On the twenty-fifth day of April, 1905, a motion for a continuance was denied. On the same day a motion for change of venue was submitted to the court and granted. On the fourth day of May, in Bannock county, a motion and affidavit for a continuance of the cause, also a motion to postpone the time of trial to a later date; both of these motions were overruled. On the same day a jury was impaneled, and on that and the succeeding day a trial was had which resulted in a verdict of guilty as charged in the information, and on the eleventh day

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of August, 1905, appellant was sentenced to serve a term of two and one-half years in the state penitentiary.

Counsel for appellant insists that the demurrer to the information should have been sustained, as it does not state whether the money claimed to have been embezzled was the property of Bingham county or of E. C. Shearer, and does not in any manner comply with sections 7677 and 7678, of the Revised Statutes of Idaho. Subdivision 2, section 7677, provides: "A statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." The information informs the defendant that he, as sheriff of Bingham county, has received \$500 from E. C. Shearer for a license to sell spirituous, vinous, malt and intoxicating liquors within said Bingham county, state of Idaho: that he has, as such sheriff, unlawfully, willfully, fraudulently and feloniously appropriated to his own use such sum of money; that such willful, unlawful, fraudulent and felonious appropriation was made about the twenty-third day of May, 1904. An examination of section 7678 will disclose that the information fully complies with its requirements. The purpose of these two sections of the statute, it seems, should be so easily understood, and a fair consideration of them, it occurs to us, is that when the indictment or information informs the accused that on or about a date specified, the grand jury by indictment, or the prosecuting attorney by information, charges the accused of some crime known to our statute, that the alleged unlawful act was done willfully, unlawfully and feloniously, the language used in the charging part of the complaint, information or indictment indicating to the accused the particular crime with which he is charged, if the instrument sufficiently informs the accused of the time, place, circumstances and conditions of his alleged unlawful act, and that it is unlawful, wrongful, malicious and felonious, or other words used by the statute to indicate the particular crime charged, then the accused is informed what he must prepare to meet on the trial. We do not find the information in the case at bar lacking in any

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of the essential elements for a charge of the crime of embezzlement under our statute. Section 7065 of the Revised Statutes defines embezzlement as follows: "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Section 7066 of the Revised Statutes provides how and when an officer, public or private, is guilty of embezzlement as follows: "Every officer of this state, or of any county, city, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement."

We find no error in the order of the court overruling the demurrer. (See *Brady v. Territory*, 7 Ariz. 12, 60 Pac. 698, *People v. Cobler*, 108 Cal. 538, 41 Pac. 401; *People v. Jose De La Guerra*, 31 Cal. 416.) It is also urged by counsel for appellant that the court erred in "denying the defendant time to prepare for trial." It is shown that the case was removed from Bingham to Bannock county for trial on application of appellant, and that the clerk of Bingham county had complied with section 7773 of the Revised Statutes, by transmitting all the papers and necessary records to the clerk of Bannock county. Counsel for appellant say "defendant did not know that they were received by the clerk of the court of Bingham county until the second day of May, 1905, and the court, at 7:30 o'clock P. M. of May 2d, set the case for trial on the fourth day of May, 1905, at 10 o'clock A. M., thus giving the defendant one day in which to get ready for trial, and that the defendant is entitled to at least two days in which to prepare for trial." Section 7790 of the Revised Statutes provides: "After his plea, the defendant is entitled to at least two days to prepare for trial." It is shown that the plea of not guilty was entered in the district court of

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Bingham county on the nineteenth day of April, 1905, and the case set for trial in that county for the twenty-first day of April, 1905, at 10 o'clock A. M. It will be observed that section 7790, *supra*, does not say defendant shall have at least two days to prepare for trial after the case is set for hearing, but at least ten days after plea, hence appellant had much more than the statutory time to prepare for trial. We are not prepared to believe, if a proper showing had been made that it was impossible for the defendant to secure the presence of his witnesses at the time set for trial, the learned judge below would not have given such time as seemed necessary for him to procure their attendance; he did furnish the court with an affidavit that his witnesses all lived in Bingham county, and that they could not be reasonably procured within the time set for the trial of said cause. This affidavit was met by that of Robert M. McCracken, the prosecuting attorney of Bingham county, in which he testifies that all the witnesses for the prosecution were procured in time for the trial, and that the witnesses for the defense could have been procured within the time if a proper effort had been made by defendant. Applications of this character are largely within the discretion of the court, and unless it is shown that there has been an abuse of this discretion, the judgment will not be reversed. We find no abuse of discretion in the orders overruling the motion for postponement of the trial, or a continuance of the case. (*People v. Walter*, 1 Idaho, 386; *State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061; *State v. Rice*, 7 Idaho, 762, 66 Pac. 87; *State v. Rooke*, 10 Idaho, 388, 79 Pac. 82; *State v. Wetter*, 11 Idaho, 433, 83 Pac. 341.)

Counsel for appellant next urge as error the refusal of the court to sustain the objection of defendant "to the appearance of Standrod & Terrell, as counsel for the state, as there is no law authorizing such appearance by private counsel in criminal actions, and it is against public policy." Our attention is called to *Conger v. Board of Commissioners*, 5 Idaho, 347, 48 Pac. 1064. This case holds that individual members of the board of county commissioners cannot make a contract to bind the county. "It is the county commissioners acting as

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a board that are given that authority" (that is, the authority to employ counsel). So says that opinion. This question has been before this court in *State v. Crump*, 5 Idaho, 166, 47 Pac. 814; *People v. Biles*, 2 Idaho, 114, 6 Pac. 120; *State v. Williams*, 4 Idaho, 502, 42 Pac. 511; *People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; *People v. Lidwell*, 4 Utah, 506, 12 Pac. 61; *Territory v. Catton* (*People v. Catton*), 5 Utah, 451, 16 Pac. 902. We find no error in denying this objection.

The next assignment is based on the ruling of the court to the following questions: "Now, I will ask you, witness, to examine that record again, and say whether or not it contains any items of moneys received for liquor license issued to the Montana saloon, November 1, 1904?" The record shows that the witness was one W. W. Kinney, who was deputy sheriff under appellant, and as such deputy issued the receipt for the money claimed to have been embezzled by appellant; that he turned the check given him by E. C. Shearer for license over to appellant the same night or the next morning after it was received by him. The record referred to in the question was what is known as the "license register." After examining the record, witness testified that "there was no record in the book for the \$501 for liquor license for Mr. Shearer; the receipt given Mr. Shearer by Kinney had been introduced in evidence by the prosecution; other questions of similar import, which referred to other licenses were asked, objected to by appellant, and the witness permitted to answer, all of which is alleged as error prejudicial to appellant. It is apparent that the purpose of the examination of the witness who testified that he was the deputy sheriff at the time and before the alleged embezzlement of the \$501, paid by Shearer for license, and was familiar with the record of licenses kept by the sheriff, and that it was the only book kept for "recording licenses" while he was deputy sheriff, was to show that the book did not contain an account of certain licenses. The entire record was in evidence, and counsel for appellant had the opportunity to examine it and ascertain whether the witness testified truthfully or otherwise, and

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to cross-examine him to any extent he saw fit. Counsel for appellant insists that the book of record was the best evidence. We agree with this contention, but there was no error in having the witness familiar with the record point out to the jury the particular instances wherein the record was deficient in showing that which it was intended it should show. Appellant was there to assist his counsel in showing any error or falsehood in the evidence of the witnesses relative to this record. We find no error in the ruling of the court in this particular.

It is next insisted that the court erred in permitting George S. Gagon, who it was shown was clerk of the board of commissioners of Bingham county during the entire term of appellant as sheriff of that county, and for a long time prior thereto, to answer the following questions: "What was your custom, Mr. Gagon, in receiving bonds of this character; what did you do with them?" He answered that he delivered them in the sheriff's office, and continued: "But I can't say I delivered this bond there." It was perhaps immaterial, as well as incompetent, what his custom may have been, but we cannot see how the appellant could be prejudiced by what he said his custom was, especially when he says he can't say he delivered the one in question there. Appellant urges that the court should have sustained the objection "to the introduction of the minute record of the board of commissioners, for the reason that these entries were made after defendant had retired from office and could not bind him, as he was not even present when they were made, and they tend to prejudice the minds of the jury against the defendant."

The record introduced is as follows, in the matter of the shortage of Peter A. Steers, former sheriff: "On this day it was ordered by the board of county commissioners that R. M. McCracken, county attorney, ascertain the amount of money paid to Peter A. Steers for liquor license, and which has not been paid over to the county by Steers, and to demand the amount of money so ascertained. Ordered that if the amount of liquor license money collected by Steers is not turned over to the county upon demand, the county attorney is ordered, authorized and directed to bring an action for said board of

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county commissioners on behalf of said county against said Steers and his bondsmen."

We know of no provision of our statute that requires the presence of the sheriff or any other officer when the county commissioners are making up their record. This was simply an order requiring the county attorney to ascertain whether appellant was delinquent in the settlement of his accounts, and if so, he was required by the order to enforce collection by suit against appellant and his bondsmen. How could this record prejudice jurors against appellant? If the county attorney found no deficiency, his duty was easy; he had only to report that fact to the commissioners, and his labors were ended. The introduction of this record may have been immaterial, but certainly not prejudicial. It is insisted that the court erred in not permitting County Attorney McCracken to answer the following questions on cross-examination: "Q. Didn't they (meaning the agent of the bonding company, defendant and some citizens of Blackfoot) make a request of you to let this matter stand until the civil suit was decided to see whether he (Steers) was owing Bingham county anything? Q. Didn't Mr. King as agent of the bonding company, and also several citizens in Blackfoot, request you to delay proceedings until matters were settled in the civil court?" In what way could it benefit appellant if the agent of the bonding company and every citizen of Blackfoot made the request of the witness as above indicated? Could or would it excuse him from the performance of his sworn duty? If he believed any officer of his county was guilty of the crime of embezzlement, or any other crime, the law fixes his duty and the agent of the bonding company, the citizens of Blackfoot, nor even the board of commissioners can in any way control his action. There was no error in sustaining an objection to this question. It is shown that appellant offered to show by E. H. Watson, a practicing attorney of this court, that said Watson was attorney for defendant, and advised the defendant not to turn over the money in question to the county unless the court should hold it to be county money, and in support of this advice, defendant offered in evidence

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a certain judgment-roll, where the district court of Fremont county held that such moneys were not county moneys, and held the sheriff liable on his bond for so treating it. If parties charged with the safekeeping of county money could be excused from their wrongful and unlawful acts on the theory alone that their attorneys had advised them to withhold the money collected in their official capacities, then the criminal laws of the state would be a farce, and the next legislature should be importuned to repeal all laws enacted to enforce faithful and honest performance of public duties. Counsel for appellant says, "Shearer did not file his application or bond for license until some time after the defendant went out of office. The law requires the officer to turn over the money when the license is sold and not before." Granting all this to be true, what right had defendant to withhold this money? Why did he not pay it over to his successor in office if his term as sheriff had expired; or if he had doubts as to the proper disposition of the money alleged to have been embezzled, why did he not deposit it with the clerk of the district court with instructions to safely keep it until it was determined what disposition should be made of it? Can it be supposed that a prosecuting officer would have filed his information charging appellant with embezzlement had he been informed that the money was on deposit with the clerk or in any other safe place, and where it could be had when it was finally determined to the satisfaction of the appellant where the money should go? Even if he had filed his information and appellant had been prepared to show good faith and honest purposes by placing the money in the hands of any reliable person to be paid over as directed by the court, could a jury be found in Bingham or Bannock county that would have said he was guilty of embezzlement or any other crime? Certainly not. If such conditions had been shown to exist, the court would have instructed the jury to return a verdict of not guilty; at least that would have been its plain duty. But if the advice of his counsel under any circumstances could be an excuse for withholding the money, it could not aid him under the showing made by the record in this case.

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We find the money was paid for a license to retail liquors in Bingham county by Mr. Shearer to the deputy sheriff of Bingham county, on the twenty-third day of May, 1904. The deputy sheriff testifies that he turned the money over to appellant that evening or next day. Shearer continued his saloon business, and appellant did not seek the advice of his counsel until after demand had been made on him by the county attorney for the payment of this money, and after the expiration of his term of office. Appellant knew it was not his money; he also knew it was not Shearer's money, as he was conducting the business for which he had paid the money for license to so conduct. An officer cannot avoid the plain mandate of the statute in this way. The advice of his counsel long after the alleged crime was committed cannot avail him; if so, it would be impossible to convict an officer charged with the crime of embezzlement.

It is next urged that the court erred in not admitting in evidence the judgment-roll in a certain case theretofore tried in the district court of Fremont county, wherein it is claimed that the court found that money paid to the sheriff under similar circumstances to the case at bar was not the property of the county. We know of no rule of law that would make such evidence competent. It might be available in an effort to induce the court to instruct the jury that such money was not the property of the county, but, even then, the court might take a different view of the law and refuse to give such instructions; then the question could be presented to this court as an error of law occurring at the trial, but if appellant desired to show by this record that he was withholding the payment of the money without criminal intent, he did not bring himself within the rules of law prescribed for the introduction of this evidence, and the record would not have aided him owing to the difference in the facts. In justice to the learned judge who presided over the court at the time the findings and judgment above referred to were made and entered, we feel it our duty to say the facts in that case were widely different from the one at bar. Neither the county nor state was a party to the litigation; it was a

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suit of an executor of a will against the sheriff of Fremont county and his bondsmen. The complaint alleged that the plaintiff as executor, etc., had commenced an action against Frank Brady and A. S. Anderson to recover the sum of \$444.64 on a promissory note in favor of plaintiff testator. Summons was issued, and thereafter a writ of attachment was issued and placed in the hands of Hanson with instructions to serve said papers and attach the sum of \$425 in his, said Hanson's, possession, belonging to Frank Brady, one of the defendants, etc. That in pursuance of said writ of attachment, said Hanson by his deputy, D. P. Rich, did attach the sum of \$425, lawful money belonging to said Brady. Later a judgment was secured by plaintiff against the defendants for the sum of \$496.61 and costs. That plaintiff demanded of said Sheriff Hanson said money held by him under the writ of attachment, and also placed a writ of execution in his hands, but that said plaintiff Hanson failed and refused to turn over the money so attached. Then it is shown that another execution was placed in the hands of the said defendant Hanson and frequent demands were made for the money alleged to be in his hands. The answer denies that Hanson, as sheriff, or otherwise, had any money belonging to Frank Brady, but alleges that on the twelfth day of June, 1901, Brady paid to Hanson, as sheriff, the sum of \$425 to apply on a retail liquor dealer's license from June 2, 1901. On August 10, 1901, a further sum of \$75 was paid by said Brady to said Hanson as sheriff, and that said money as above paid to Hanson as sheriff was not the money of Brady after it was paid, but belonged to the license moneys of the county of Fremont. Hanson testified that he had received a partial payment from Brady for a liquor license, but did not return the money as county money for the reason he did not have full payment and was expecting the balance; that he gave Brady a receipt for the \$425 for partial payment on liquor license, and that the attachment was served before the balance of the \$75 was paid. The jury returned a verdict for plaintiff. Without an expression of our opinion of the justice or legality of this verdict and judgment, it is

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readily seen that the facts were very different from the case at bar. In *Beeman v. Hanson et al.*, the controversy was between Beeman and Hanson as sheriff. The county did not intervene and set up any right to the money. It was shown that the full amount of money had not been paid and a receipt given for only partial payment for a liquor license for one year from June 2, 1901. Before the payment was fully made, an attachment was issued and the sheriff made his return showing the above facts. Not so in the case under consideration. The entire payment had been made by Shearer and the sheriff had given his receipt therefor. Shearer was permitted to conduct his business during the balance of the term of office of appellant. No controversy between the sheriff (appellant) and anyone else by reason of a writ of attachment or other proceedings questioning the ownership of the money in his hands paid by Shearer, no one demanding it excepting the county through its county attorney, and that demand was that the money should be paid to the county for the purposes for which it was paid to him for the county by Shearer, and for which Shearer had had the benefit by conducting his business. Objections are urged to the giving of certain instructions and refusal to give certain requests of counsel for appellant. A careful examination of the instructions convinces us that they fairly state the law on all the material issues involved in the prosecution, and in our view of the case the requests of counsel for appellant were properly rejected by the court. It is apparent from the instructions given by the court and the character of the evidence submitted by the prosecution that the case was prosecuted and the jury instructed on one theory alone, and that was that by the acts of appellant in collecting and receipting for the money from Shearer and permitting him to continue his business without a full compliance with the statutory requirement, and failing and refusing to turn the money into the proper channel before and after his term of office had expired, constituted the crime of embezzlement. If we are to be guided by the character of evidence offered on behalf of appellant, together with the requests for instructions prepared and sub-

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mitted to the court to be given to the jury as the law of the case, the theory was that the appellant could withhold the money paid him by Shearer for the express purpose of procuring a retail liquor dealer's license until the court should determine to whom the money belonged, thus avoiding the penalty of wrongfully withholding the money and escaping a prosecution for the crime of embezzlement. The law does not encourage such conduct by the officials of the state. It requires honesty in all branches of the public service. We think the judgment should be affirmed, and it is so ordered.

Ailshie, J., and Sullivan, J., concur.

(March 8, 1906.)

THE NATIONAL BANK OF THE REPUBLIC, Respondent, v. JAMES D. AGNEW, Appellant.

[85 Pac. 116.]

APPEAL—DISMISSED ON MOTION WHEN.

1. A motion to dismiss an appeal will be sustained when it is shown that counsel for appellant has been served with such notice and fails to appear and resist such motion, unless it appears to the court that appellant is not guilty of laches.

(Syllabus by the court.)

APPEAL from the District Court of the Third Judicial District for Ada County. Hon. George H. Stewart, Judge.

Plaintiff secured judgment and defendant appealed. Motion to dismiss for want of prosecution sustained.

S. H. Hays, for Respondent.

No appearance in this court for Appellant.

STOCKSLAGER, C. J.—Respondent moves to dismiss the appeal taken from a judgment rendered in the district court of Ada county on the eighth day of March, 1905. It is shown that counsel for appellant was notified to appear in this court and show cause why such motion should not be sustained;

Points Decided.

and there being no appearance on behalf of appellant, the motion will be sustained, and it is so ordered. Costs to respondent.

Ailshie, J., and Sullivan, J., concur.

(March 12, 1906.)

A. E. WOOD, Appellant, v. CLAUS F. BRODERSON, Respondent.

[85 Pac. 490.]

BROKER'S COMMISSION FOR SALE OF REAL ESTATE—FINDINGS OF FACTS—INSUFFICIENCY OF EVIDENCE—CONFLICT IN EVIDENCE—PROCURING PURCHASER.

1. Where the court fails to find on all the material issues made by the pleadings, the judgment will be reversed unless a finding upon such issues would not affect the judgment entered.

2. The following finding held insufficient to support a judgment, to wit: "That all the issues of fact raised by the pleadings in this case are hereby found and decided in favor of the defendant and against plaintiff."

3. The issues made by the pleadings held sufficient to require a finding upon the rate of commission to be paid.

4. Where a party employs a real estate broker to sell a piece of real property at a stipulated price, and the broker procures a purchaser, who purchases the property at that price, the broker is entitled to his commission therefor.

5. *Held*, in this case that there is not a substantial conflict in the evidence such as to bring it within the rule that where there is a substantial conflict in the evidence, the findings of the court will not be disturbed.

(Syllabus by the court.)

APPEAL from District Court of the Seventh Judicial District for Canyon County. Hon. Frank J. Smith, Judge.

Action to recover commission for sale of real estate. Judgment for the defendant. *Reversed*.

Argument for Appellant.

Richards & Haga, for Appellant.

Where the court fails to find on all the material issues, the judgment must be reversed. (*Stanley v. Flint*, 10 Idaho, 629, 79 Pac. 815; *Carson v. Thews*, 2 Idaho, 176, 9 Pac. 605; *Bowman v. Ayers*, 2 Idaho, 305, 13 Pac. 346; *Armacaust v. Lindley*, 116 Ind. 295, 19 N. E. 138; *Haight v. Tyron*, 112 Cal. 4, 44 Pac. 318.)

A finding "that all the issues of fact raised by the pleadings are hereby found and decided in favor of the defendant and against the plaintiff" is wholly insufficient and will not support the judgment. (*Johnson v. Squires*, 53 Cal. 37; *Harlan v. Ely*, 55 Cal. 340; *Krug v. Lux Brewing Co.*, 129 Cal. 322, 61 Pac. 1125; *Ladd v. Tully*, 51 Cal. 277; *Polhemus v. Carpenter*, 42 Cal. 375.)

It is immaterial whether the issues arise upon allegations in the complaint, and denials in the answer, or upon an affirmative defense pleaded in the answer and treated as denied by the plaintiff. (Spelling on Appellate Practice, sec. 591; *Swift v. Canavan*, 52 Cal. 417; *Billings v. Everett*, 52 Cal. 661, 663; *Byrnes v. Claffey*, 54 Cal. 155; *Cassidy v. Cassidy*, 63 Cal. 353.)

It is sufficient to entitle real estate agents to their commission if a sale is effected through their agency, as its procuring cause, although the sale may be made by the owner of the property, if by their exertion the purchaser and owner are brought together, and the sale results therefrom. (*Mattatt v. Elliott*, 69 Kan. 477, 77 Pac. 104; *Norris v. Byrne*, 38 Wash. 592, 80 Pac. 808; *Smith v. Anderson*, 2 Idaho, 537, 21 Pac. 412.)

Where the price or other terms of sale are fixed by the seller, in accordance with which the broker undertakes to produce a purchaser, yet if, upon procurement of the broker, a purchaser comes with whom the seller negotiates, and thereupon voluntarily reduces the price of the thing to be sold, or the quantity, or otherwise changes the terms of sale as proposed to the broker, so that the sale is consummated, or terms or conditions offered which the party proposing to buy is

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ready and agrees to accept, then, and in either such case, the broker will be entitled to his commission. (*Stewart v. Mather*, 32 Wis. 344, 349; *Lincoln v. McClatchie*, 36 Conn. 136; *Potvin v. Curran*, 13 Neb. 302, 14 N. W. 400; *Woods & Piers v. Stephens*, 46 Mo. 555; *Schlegal v. Allerton*, 65 Conn. 260, 32 Atl. 363; *Ratts v. Shepherd*, 37 Kan. 20, 14 Pac. 496; *Warvelle on Vendors*, sec. 230, and cases there cited; *Adams v. Decker*, 34 Ill. App. 17; *Levy v. Coogan*, 16 Daly, 137; *Wilson v. Sturgis*, 71 Cal. 226, 16 Pac. 722; *Jones v. Henry*, 15 Misc. Rep. 151, 152, 36 N. Y. Supp. 483; *Wood v. Wells*, 103 Mich. 320, 61 N. W. 503; *Wetzell v. Wagoner*, 41 Mo. App. 509. 516; *Ward v. Cobb*, 148 Mass. 518, 12 Am. St. Rep. 587, 20 N. E. 174.)

If a purchaser is found after the time limit fixed, and the principal, without objection, then deals with the purchaser so found, he waives the delay. (*Mechem on Agency*, p. 797; 23 Am. & Eng. Ency. of Law, 903.)

It is not necessary, in order for a real estate broker to recover his commission, that he should personally have conducted the negotiations between the seller and the purchaser, or that he should have been present when the bargain was completed; it is sufficient, to entitle him to his commission, that his efforts were the procuring cause of the sale and that through his agency the purchaser was brought into communication with the seller and that a sale resulted therefrom. (*Hafner v. Herron*, 165 Ill. 242, 46 N. E. 211; *Mechem on Agency*, sec. 966; *Marlatt v. Elliott*, 69 Kan. 477, 77 Pac. 104; *Smith v. Anderson*, 2 Idaho, 537, 21 Pac. 412; *Finnerty v. Fritz*, 5 Colo. 174; *Buckinham v. Harris*, 10 Colo. 455, 15 Pac. 817; *Nolan v. Swift*, 111 Mich. 56, 69 N. W. 96; *Griswold v. Pierce*, 86 Ill. App. 406; *Goffe v. Gibson*, 18 Mo. App. 1; *Hambleton v. Fort*, 58 Neb. 282, 78 N. W. 498.)

In the absence of an agreement respecting the amount of compensation, or anything to show that the services were merely gratuitous, the law implies a reasonable amount, a *quantum meruit*. (*Baer v. Roech*, 21 N. Y. Supp. 974, 51 N. Y. St. Rep. 427.)

Argument for Respondent.

Whenever a sale is effected through the efforts of a broker, or through information derived from him, so that he may be said to be the procuring cause of it, his services are regarded as highly meritorious and beneficial, and the law leans to that construction which will best secure the payment of its commission rather than to the contrary. (*Stewart v. Mather*, 32 Wis. 344, 350.)

T. D. Cahalan, for Respondent.

There is a great conflict of evidence in this case. The appellate court will not disturb a judgment or verdict, or order denying a new trial where there is a substantial conflict in the testimony, and no rule of law appears to have been violated. (*Sharon v. Sharon*, 79 Cal. 633, 23 Pac. 26, 131; *Mootry v. Hawley*, 1 Idaho, 543; *Pine v. Callahan*, 8 Idaho, 684, 71 Pac. 743; *State v. Rathbone*, 8 Idaho, 161, 67 Pac. 186; *Spaulding v. Coeur d'Alene R. Co.*, 5 Idaho, 539, 51 Pac. 408; *Commercial Bank v. Lieualten*, 5 Idaho, 47, 46 Pac. 1020; *Huston v. Twin etc. R. R. Co.*, 45 Cal. 552.)

When a jury has been waived by the parties, and the court finds the facts, the facts so found have the same legal effect as if found by a jury, and not being the subject of review in this court are therefore conclusive. (*Swayne v. Waldo*, 73 Iowa, 749, 5 Am. St. Rep. 712, 33 N. W. 78; *Wheeler v. Hays*, 3 Cal. 286; *Handlan v. McManus*, 100 Mo. 124, 18 Am. St. Rep. 534, 13 S. W. 207; *Smith v. Anderson*, 2 Idaho, 537, 21 Pac. 512.)

An examination of the evidence shows not only a "substantial," but an apparently irreconcilable conflict, and where there is a substantial conflict in the evidence, a finding of fact by the court, based thereon, will not be disturbed. (*O'Connor v. Langdon*, 2 Idaho, 805, 26 Pac. 659; *Spaulding v. Coeur d'Alene Ry. Co.*, 5 Idaho, 539, 51 Pac. 508; *Ainslie v. Printing Co.*, 1 Idaho, 643; *Simpson v. Remington*, 6 Idaho, 681, 59 Pac. 360; *Sears v. Flodstrom*, 5 Idaho, 314, 49 Pac. 12; *Tagge v. Alberts*, 2 Idaho, 251, 13 Pac. 19.)

Argument for Respondent.

A general finding that all the allegations of the answer are true, and that all the allegations of the complaint are untrue, is sufficient if the pleadings are sufficient. (*Williams v. Hall*, 79 Cal. 607, 21 Pac. 965; *County of San Diego v. Seifert*, 97 Cal. 597, 32 Pac. 644; *Carey v. Brown*, 58 Cal. 184; *Bravelli v. Bianchi*, 136 Cal. 613, 69 Pac. 416.)

Where the finding made is conclusive against the right of the plaintiff to recover, findings upon other issues are unnecessary to support the judgment against him. (*Dyer v. Brogan*, 70 Cal. 139, 11 Pac. 589; *Murphy v. Bennett*, 68 Cal. 529, 9 Pac. 738; *Dedmon v. Moffit*, 89 Cal. 213, 26 Pac. 800; *Southern Pac. R. R. v. Dufour*, 95 Cal. 619, 30 Pac. 783, 19 L. R. A. 92; *Lion v. McClory*, 106 Cal. 627, 40 Pac. 12; *Adams v. Crawford*, 116 Cal. 599, 48 Pac. 488; *Breeze v. Brooks*, 97 Cal. 77, 31 Pac. 742, 22 L. R. A. 256; *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189.)

Lawful conclusions on disputed questions of fact cannot be interfered with on appeal. (*Wilson v. Trenton*, 61 N. J. L. 599, 68 Am. St. Rep. 716, 40 Atl. 575, 44 L. R. A. 540.)

If there is evidence to support findings, its weight is within the province of the trial court, and its determination cannot be disturbed on appeal. (*Singleton v. Hill*, 91 Wis. 51, 51 Am. St. Rep. 868, 64 N. W. 588; *Dilman v. Carlin*, 105 Wis. 14, 76 Am. St. Rep. 903, 80 N. W. 932, 46 L. R. A. 478; *Wilson v. Commercial Assur. Co.*, 51 S. C. 540, 64 Am. St. Rep. 706, 29 S. E. 245; *Strickley v. Hill*, 22 Utah, 257, 83 Am. St. Rep. 791, 62 Pac. 893.)

The evidence must show that the plaintiff brought the minds of the buyer and seller of the orchard to an agreement for a sale. (*Zeimer v. Antisell*, 75 Cal. 510, 17 Pac. 642; *Babcock v. Merritt*, 1 Colo. App. 84, 27 Pac. 884; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 163, 42 N. E. 134.)

The very essence of a brokerage commission is that it is dependent upon success, and that it is in no way dependent upon or affected by the amount of work done by the broker. (*Cadigan v. Crabtree*, 179 Mass. 474, 83 Am. St. Rep. 397, 61 N. E. 37, 55 L. R. A. 77.)

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SULLIVAN, J.—This action was brought to recover a commission of \$700 for services rendered in selling for the plaintiff forty acres of land, situated near the town of Payette, Canyon county, for the sum of \$14,000. The complaint sets out two causes of action: one on contract, and the other on *quantum meruit*. It is alleged, among other things, in the first cause of action, that the plaintiff was a real estate agent, and on or about the 1st of January, 1903, defendant employed him to sell a certain forty-acre tract of land situated near the town of Payette, and promised to pay the plaintiff for services rendered in securing a buyer for the same a commission of five per cent on the purchase price thereof; that plaintiff, after being so employed, expended a considerable sum of money in advertising said real estate and in taking persons out to view the same, and that through such services and efforts a sale of said premises was made on or about the 5th of October, 1903; that thereupon defendant became indebted to the plaintiff in the sum of \$700. And as a second cause of action the plaintiff alleges that while engaged as a real estate agent and broker, the plaintiff performed services for the defendant at defendant's instance and request in effecting a sale for defendant of a certain forty-acre tract of land belonging to the defendant and situated near the town of Payette; that plaintiff expended considerable sums of money in advertising said land for sale and taking persons out to inspect the same, and that through his services and efforts a sale of said premises was made on the fifth day of October, 1903, for the sum of \$14,000; that plaintiff's services were reasonably worth \$700, which at the time of the sale defendant undertook and promised to pay, but no part thereof has been paid, although payment of the same has been demanded by the plaintiff.

The prayer is for \$700 damages, with interest and costs.

The defendant, by his answer, specifically denies the allegations of the complaint, and in his second defense sets up a contract entered into on or about the tenth day of April, whereby plaintiff was to receive two and one-half per cent commission for the sale of the lands in question and adjoining land at \$250

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per acre, and avers that no sale was made thereunder. Defendant then sets up a second contract entered into about the fifteenth day of September, 1903, whereby the plaintiff was to sell the forty-acre tract that was subsequently sold for \$14,000, at a commission of two and one-half per cent, but alleges that the defendant withdrew the land from sale on the 29th of September, informing the plaintiff at that time that the land was no longer for sale. Both of said contracts were oral. Judgment was entered for the defendant, and a motion for a new trial was overruled. This appeal is from the judgment and said order.

The failure of the court to find upon all the issues raised in the pleadings is assigned as error, as well as the insufficiency of the evidence to justify the findings and decision of the court. As to the first assigned error: It is clear that the court failed to find upon all of the material issues raised by the pleadings. The issue of the employment of appellant to sell the real estate described in the complaint is found in favor of appellant, but fails to find the amount or per cent of commission to be paid for such services. It is alleged in the first cause of action that respondent agreed to pay five per cent on the purchase price of said land as commission, while respondent averred in his answer and testified on the trial that it was two and one-half per cent, and the court failed to find upon that issue.

It was alleged in the complaint that the appellant expended considerable money in advertising said real estate for sale, and in taking persons out to view it for the purpose of buying. Those allegations were denied by the answer, and the court failed to make a finding thereon. The respondent averred in his answer that the first contract with appellant was to terminate on July 1, 1903, and the court failed to find on that issue. As an affirmative defense the respondent averred a contract entered into with appellant on the 15th of September, 1903, for the sale of said land, and avers that said contract was to continue for one week only. This defense is significant, and, as I view it, has an important bearing on this case, as it is averred that said land was listed with appellant for sale at

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\$14,000, the very price that respondent sold the land for on the 5th of October, 1903, to a purchaser introduced to him by appellant. But it is contended by counsel for respondent that appellant did not "*introduce*" the purchaser to respondent. In such transactions as this the formal introduction required in polite society is not absolutely necessary. It is sufficient if the appellant procured the purchaser. The court failed to find on this affirmative defense, although it was a clear-cut issue and considerable testimony received thereon. As late as September 29th, only seven days before the sale, respondent avers in his answer that he asked appellant if he had yet found a purchaser for said land, when, according to the averment in his answer, the contract, which was to continue for a week only, had expired on September 22d. Why ask that question on that date if the contract had been terminated seven days before? An issue was made as to the amount of commission to be paid in case of a sale, and also as to whether the respondent withdrew from sale the land in question on September 29th, and terminated the contract between them, and the court failed to make findings thereon.

The fourth finding is apparently a very sweeping one, and is as follows: "That the plaintiff, under said employment, never sold defendant's said land, nor any part thereof, to any person, nor did the plaintiff ever notify the defendant, or his agent, that he had sold said property, or any part of the same. for any sum at all, or that he had found a purchaser for said land, or any part thereof, at any price or sum, nor did plaintiff ever present a purchaser to the defendant." When analyzed, this finding does not meet the issues. While it is there found that appellant "never sold defendant's land," and did not "notify the defendant or his agent that he had sold said property . . . or that he had found a purchaser for said land . . . nor did plaintiff ever present a purchaser to the defendant," as under the issues appellant, to earn his commission, was not required to "sell said land," nor formally "notify" the defendant that he had sold the same or that he had found a purchaser or "presented" a purchaser to re-

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spondent. It was sufficient if the appellant found a purchaser, showed him the land, and explained its desirability as a purchase, and was instrumental in making the sale. No formal introduction of the purchaser to the owner was necessary, and no formal notification was required, but the evidence clearly shows that appellant gave respondent the name of purchaser, and he testified that a Mr. Wells, in the employ of appellant, introduced him to respondent. Said finding is equivocal, evasive, and does not squarely meet the issues.

The rule is well established in this state that when the court fails to find on all of the material issues, the judgment will be reversed, unless a finding thereon either for or against the successful party would not affect the judgment entered. (*Tage v. Alberts*, 2 Idaho, 249 (271), 13 Pac. 19; *Standley v. Flint*, 10 Idaho, 629, 79 Pac. 815; *Carson v. Thews*, 2 Idaho, 176, 9 Pac. 605; *Bowman v. Ayers*, 2 Idaho, 305, 13 Pac. 346; *Haight v. Tyron*, 112 Cal. 4, 44 Pac. 318.) This rule applies to all material issues, even though made by affirmative defenses. In 2 Spelling on Appellate Practice, section 591, the author says: "It is immaterial whether the issue arises upon allegations in the complaint and denials in the answer, or upon affirmative defenses pleaded in the answer and treated as denied by the plaintiff."

Reliance is placed upon the sixth finding by counsel for respondent, which finding is as follows: "That all the issues of fact raised by the pleadings in this case are hereby found and decided in favor of defendant and against the plaintiff." That finding at once suggests an inquiry as to what issues are raised by the pleadings, and that in many cases is of no little difficulty to determine. Take the case at bar: the court below may have concluded that the affirmative defense set up in the answer did not present an issue, while this court has concluded that it did so. Said finding is indefinite and not a sufficient finding. (*Johnson v. Squires*, 53 Cal. 37.)

It is difficult to determine from the finding of facts the exact position of the trial court. But from the record we infer

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the court took the view that said land was not sold under the first agreement between the parties, and as stated by the judge, "the plaintiff has failed to establish by a preponderance of the evidence that he ever notified defendant that he had a purchaser for said land under said agreement." The rule does not require a formal notification in such a matter. It is sufficient if plaintiff procured the purchaser. And the judge said: "The evidence discloses a subsequent agreement made in September, 1903, but does not show the rate of compensation, or any agreement in regard to the amount of compensation plaintiff was to receive for his services in selling said property. The evidence shows clearly that the plaintiff performed certain services for defendant, but there is an absolute failure of proof as to the reasonable value of said services." This statement would indicate that the court found for respondent because of an absolute failure to prove the value of the services, which the court conceded the appellant had performed. On the question of compensation, respondent avers in his answer that he stipulated to pay two and one-half per cent commission in case of a sale, and on that admission the appellant was entitled to judgment in case he procured the purchaser.

Witness Brainard testified that on selling a farm like the one described in the complaint, a reasonable commission would be five per cent. This, I think, sufficient to fix the commission to be paid, if appellant procured the purchaser. The answer of respondent admits that the land was listed with appellant for sale in April, 1903, but the parties do not agree as to the time the contract was to continue and the commission to be paid in case of a sale. The respondent contends that the contract was to expire on July 1, 1903, while the appellant contends that in case the orchard tract was not sold until after July 1st, respondent should retain that year's crop, and if sold before that date, the crop was to go with the land.

It also appears that after the first day of July, the respondent called on appellant and urged him to sell said land, and that he continued to advertise the same and show it to pros-

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pective purchasers. While the respondent testified that said contract was to terminate on July 1st, the circumstance of his calling on appellant repeatedly after that date and urging him to sell said land, and when a purchaser procured by appellant went to respondent in September, he did not protest that the land was not for sale, but assisted the appellant in showing the land to the best advantage by furnishing returns from the sale of fruit, and arranged for the purchaser to go through and examine the house on the premises. If the place was not for sale after the 1st of July, it is a little remarkable that when the purchaser called on him on the 15th of September, and talked with him in regard to the purchase of the property, that he did not then and there inform him that the property was not for sale. It further appears from the record that the appellant found a purchaser for said land at \$300 per acre, and when he informed the respondent that he had found a purchaser, respondent asked at what price, and the appellant informed him that it was at the price of \$300 per acre. He replied that he could not take that for it then, and the appellant replied that "it was a pretty late time then to put up the price." The appellant there informed the respondent that he feared the raise in the price would block the sale; that it would bar the sale. It was at that time respondent informed the appellant that he would take \$14,000, or \$350 per acre, for said land, and, after appellant had persuaded the purchaser to give that amount, and the purchaser informed the respondent that he would take it at that price, the respondent testified as follows in regard to that transaction: "It kind of surprised me. He told me that he would take it, \$14,000 cash, so I told him that I had better see my wife about it; it kind of frightened me; it scared me." It seems from the evidence that the respondent was vacillating and scared and frightened whenever he was offered the price that said land was listed for. The further fact that the respondent testified that the second listing of the property for sale was to continue only for a week from the 15th of September, and thereafter testified that on

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the 29th of September he told the appellant that "it is all off," and that in seven days thereafter he sold the land to the purchaser procured by the appellant, for \$14,000, on very favorable terms as to deferred payments, would at least go to indicate that he was attempting to evade the payment of a commission to the one who had procured him the purchaser. It is clear from the evidence that the appellant not only furnished a purchaser who was ready, willing, and able to buy, but did buy the land at the listed price. At the time of the sale respondent, for some reason, requested the purchaser not to inform the appellant of the sale, apparently desiring to keep it a secret and keep appellant in ignorance of the sale. Considering all the facts of the case and the statement of the respondent that the power to sell was revoked on the 29th of September, yet in the face of that statement, the circumstance that seven days thereafter he proceeds to sell the property to the very person whom the evidence clearly shows was procured by the appellant, is at least very significant. *Smith v. Anderson*, 2 Idaho, 537, 21 Pac. 412, was a case somewhat similar to the case at bar; the court said, after reciting the facts: "Considering these facts, and considering the fact that the defendants stated in their letter of revocation that they did not desire to sell the ranch, yet, in the very teeth of that statement, proceeded to sell, and to the very person to whom the plaintiff had introduced them, it is a fair inference from the testimony that the object of the letter of revocation was an attempt to deprive the plaintiff of his commission."

While there is a conflict in the oral testimony on some points in the case, the circumstances and physical facts surrounding the transaction clearly support the contention of the appellant, and that, in connection with the failure of the court to find upon the material issues, requires a reversal of the judgment, and the granting of a new trial in order that justice may be done. There is not such a conflict in the evidence as would bring this case within the well-established rule on the question of substantial conflict therein.

Points Decided.

The judgment is reversed, a new trial granted, and the cause remanded, with costs in favor of appellant.

Stockslager, C. J., concurs in conclusion reached.

Ailshie, J., concurs.

(March 14, 1906.)

BANK OF COMMERCE, Limited, Appellant, v. GEORGE E. BALDWIN and SARAH A. BOWERS, Respondents.

[85 Pac. 497.]

MARRIED WOMEN—SEPARATE PROPERTY OF WIFE—POWER TO CONTRACT.

1. Under the act of March 9, 1903 (Sess. Laws 1903, 345), a married woman is given the absolute control of her separate property and estate, and has the unqualified right of contracting with reference to such property, and may sell and dispose of the same without the consent or approval of her husband.

2. The act of March 9, 1903, has reference only to the separate property of the wife, and the management and control thereof, and the carrying on of business therewith, and the sale or disposal thereof and contracts in reference thereto or for the benefit thereof.

3. A married woman cannot bind herself personally for the payment of a debt that was not contracted for her own use or for the use or benefit of her separate estate, or in connection with the control and management thereof or in carrying on or conducting business therewith.

(Syllabus by the court.)

APPEAL from the District Court of the Third Judicial District for Ada County. Hon. Frank J. Smith, Presiding Judge.

Action on a promissory note. Judgment by default against defendant Baldwin, and judgment of nonsuit in favor of defendant Bowers. Plaintiff appealed. *Reversed.*

Argument for Appellant.

George M. Parsons and Carl A. Davis, for Appellant.

On a motion for nonsuit, the court must accept as proven every fact which the evidence tended to prove, and which was essential to be proven, to entitle the plaintiff to a recovery upon the cause of action as stated in the complaint. (*Dow v. Gould & Curry Silver Min. Co.*, 31 Cal. 629; *Warner v. Darrow*, 91 Cal. 309, 27 Pac. 737; *Cravens v. Dewey*, 13 Cal. 40-43; *Hineman v. Matthews*, 138 Pa. St. 204, 20 Atl. 843, 10 L. R. A. 233; *Wallace v. City etc. R. Co.*, 26 Or. 174, 37 Pac. 477, 25 L. R. A. 663; *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108; *Gray v. McNeal*, 12 Ga. 429; *Schwenke v. Union Depot etc.*, 12 Colo. 344, 21 Pac. 43; *Corbalis v. Newberry Tp.*, 132 Pa. St. 9, 19 Am. St. Rep. 588, 19 Atl. 44; *Maynes v. Atwater*, 88 Pa. St. 496; *Curle v. Beers*, 3 J. J. Marsh. (Ky.) 170; *Herbert v. King*, 1 Mont. 480; *Herbert v. Dufur*, 23 Or. 462, 32 Pac. 302-304.)

Even under the old laws a married woman had the right to bind herself on a contract relative to her separate estate, and had the right to sign a note with her husband and to make her separate property liable for its payment, provided the proceeds were alleged and shown to be for the use and benefit of her separate estate. (*Bassett v. Beam*, 4 Idaho, 106, 36 Pac. 501; *Dernham v. Rowley*, 4 Idaho, 753, 44 Pac. 643.)

Her contracts need not express an intention on her part to charge her separate estate, nor need it be alleged in any suit thereon that such contract was made for the benefit of her separate estate. (*Woods v. Orford*, 52 Cal. 412; *Cartan v. David*, 18 Nev. 310, 4 Pac. 61; *Heney v. Pesole*, 109 Cal. 53, 41 Pac. 819.)

Where married women have been allowed the right of holding and managing their separate estate as if sole, they have been authorized to make all contracts necessarily incident to such enjoyment. (*Conway v. Smith*, 13 Wis. 125; *Cookson v. Toole*, 59 Ill. 519; *Williams v. Hugunin*, 69 Ill. 214, 18 Am. Rep. 607.)

Argument for Respondents.

It is not necessary to show that consideration passed to the maker of a promissory note, even though a woman. (*Burkle v. Levy*, 70 Cal. 250, 11 Pac. 644; *Alexander v. Bouton*, 55 Cal. 15; *Cartan v. David*, 18 Nev. 310, 4 Pac. 61; *Westphal v. Neville*, 92 Cal. 545, 28 Pac. 678.)

A motion for a nonsuit shall not be granted if there is any evidence to sustain the allegations of the complaint. (*York v. Pacific etc. Ry.*, 8 Idaho, 574-583, 69 Pac. 1042.)

It is error to grant a nonsuit when plaintiff has made a *prima facie* case. (*Simpson v. Remington*, 6 Idaho, 681, 59 Pac. 360; *Kansteiner v. Clyne*, 5 Idaho, 59, 46 Pac. 1019; *Lewis v. Lewis*, 3 Idaho, 645, 33 Pac. 38; *Black v. City of Lewiston*, 2 Idaho, 276, 13 Pac. 80.)

A married woman who has induced another to part with money upon representations that it was secured by and with reference to her own use and benefit is estopped to deny that it was paid on that account. (*American Mtg. Co. of Scotland v. Owens*, 72 Fed. 219, 18 C. C. A. 531.)

Note is presumptively paid out of her separate estate. (*Phillips v. Graves*, 20 Ohio St. 371, 5 Am. Rep. 675; *Dobbins v. Hubbard*, 17 Ark. 189, 65 Am. Dec. 425; *Rogers v. Ward*, 8 Allen (Mass.), 387, 85 Am. Dec. 710.)

While contracts may be void in law, equity introduces the innovation that though a married woman did not bind herself personally, yet her separate estate was thereby charged, and it was considered to be immaterial whether it was for her benefit or not. (*Matthewman's Case*, L. R. 3 Eq. 781, 787; *Hulme v. Tenant*, 1 Brown Ch.; 1 White & T. Lead. Cas. Eq. 678.)

T. D. Cahalan, for Respondents.

The common law is the rule of decision in Idaho in all cases not provided by statute (Idaho Rev. Stats., sec. 18), and a married woman cannot contract in any form unless power is expressly given by statute. (*McFarland v. Hein*, 127 Mo. 327, 48 Am. St. Rep. 631, 29 S. W. 1030; *Freeman's*

Argument for Respondents.

Appeal, 68 Conn. 533, 57 Am. St. Rep. 114, 37 Atl. 420, 37 L. R. A. 452.)

In order to charge the separate property of the wife, or render it liable to levy and sale, it must be alleged in the complaint, and proven, that the debt was incurred for the use or benefit of her separate property, or for her own use or benefit. (*Dernham v. Rowley*, 4 Idaho, 753, 44 Pac. 643; *Jaeckel v. Pease*, 6 Idaho, 131, 53 Pac. 399; *Strode v. Miller*, 7 Idaho, 16, 59 Pac. 893; *McDonald v. Rozen*, 8 Idaho, 352, 69 Pac. 125; *Holt v. Gridley*, 7 Idaho, 416, 63 Pac. 188.)

And a note made by a married woman purporting neither to charge her separate estate nor to be for her own benefit is invalid. (*Jaeckel v. Pease*, 6 Idaho, 131, 53 Pac. 399; *Fisk v. Mills*, 104 Mich. 433, 62 N. W. 559; *Wilcox v. Arnolds*, 116 N. C. 708, 21 S. E. 434.)

Where she executes a promissory note of which others are to receive the benefit, she herself being a surety in effect, she will not be held in equity to have created a charge upon her separate estate, unless the contract itself includes an express provision to that effect. (*Farrand v. Beshoar*, 9 Colo. 291, 12 Pac. 197, 198; *Bowles v. Trapp*, 139 Ind. 55, 38 N. E. 406; *Brown v. Brown*, 121 N. C. 8, 27 S. E. 998, 38 L. R. A. 242; *Westervelt v. Baker*, 56 Neb. 63, 76 N. W. 440; *Cook v. Walling*, 117 Ind. 9, 10 Am. St. Rep. 17, 19 N. E. 532, 2 L. R. A. 769.) A married woman is not bound by a promissory note executed by her jointly with another. It is the note of the other joint maker. (*Brown v. Orr*, 29 Cal. 121, 122; *Althof v. Canbrein*, 38 Cal. 233, 99 Am. Dec. 363.)

A married woman's separate property cannot be bound up under contract, unless her intent to deal with and bind the property clearly appears. Such intent cannot be assumed; it must appear that the contract is one from which benefit results to the property or for her own benefit. (*Kantrowitz v. Prather*, 31 Ind. 92, 99 Am. Dec. 587.)

The statutes of Idaho make married women incapable of contracting, except in relation to their separate property.

Opinion of the Court—Ailshie, J.

The statute of 1903 does not change section 3220 of our Revised Statutes nor the rule of the common law, so far as it applies to the contracts at large of a married woman, that she is incapable of binding herself by an executory contract, and that all such contracts made by her, whether in writing or by parol, are absolutely void at law. (*Dernham v. Rowley*, 4 Idaho, 753, 44 Pac. 645; *McKee v. Reynolds*, 26 Iowa, 578; *Pond v. Carpenter*, 12 Minn. 432; *Ames v. Foster*, 42 N. H. 381, 385; *Norton v. Meader*, 4 Saw. 605, Fed. Cas. No. 10,351; *Howe v. North*, 69 Mich. 272, 37 N. W. 213; *Payne v. Thompson*, 44 Ohio St. 193, 5 N. E. 654; *Taylor v. Boardman*, 92 Ill. 566.)

The respondent Bowers had not the legal capacity to sign a note for the use of another. (*Dernham v. Rowley*, 4 Idaho, 753, 44 Pac. 643; *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 507; *Trimble v. State*, 145 Ind. 154, 44 N. E. 260, and note, "Void Contracts.")

Except in special cases, as under the sole traders' act, a married woman cannot, by contract, create a personal liability against herself in any form. (*Macclay v. Love*, 25 Cal. 367, 85 Am. Dec. 133; *McDonald v. Rozen*, 8 Idaho, 352, 69 Pac. 125.)

Where the evidence would not authorize the jury to find a verdict for the plaintiff, or if the court would set it aside, if so found, as contrary to evidence, in such case it is the duty of the court to nonsuit the plaintiff. (*Ringgold v. Haven & Livingston*, 1 Cal. 116, 117; *Dalrymple v. Hanson*, 1 Cal. 127; *Harney v. McLevan*, 66 Cal. 35, 4 Pac. 884; *Gilman v. Bootz*, 63 Cal. 121; *Green v. Christie*, 4 Idaho, 438, 40 Pac. 55, 56.)

AILSHIE, J.—This action was commenced by the Bank of Commerce against Geo. E. Baldwin and Sarah A. Bowers to recover a balance of \$5,697.05 due on a promissory note executed by Baldwin and Mrs. Bowers on the fourth day of November, 1903. Baldwin defaulted and Mrs. Bowers answered admitting the execution of the note and the amount

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due, but denying her liability for the reason that the same was executed by her simply as a surety for Baldwin, and that the contract did not in any way affect her separate property, and was not made for her use and benefit or in reference to her separate estate. The case came on regularly for trial and the plaintiff introduced its evidence. The defendant moved for a nonsuit on the ground that the evidence of the plaintiff failed to show that the contract was executed for the benefit of or concerning the separate property or estate of Mrs. Bowers, or for her individual or separate use and benefit. This motion was sustained by the court and the plaintiff moved for a new trial, which was denied, and thereupon appealed from the judgment and order denying the motion. The principal and leading question to which the respective counsel have directed their attention on this appeal is the effect of the act of the legislature approved March 9, 1903, and entitled, "An act giving to married women the management, control and power of disposition of their separate property, amending section 2495, chapter 3, title 2, Revised Statutes of 1887 of Idaho, and repealing sections 2498 and 2499 thereof and all other acts in conflict herewith." Sections 1 and 2 of that act are as follows: "Sec. 1. That section 2495, of chapter 3, title 2, of the Revised Statutes of Idaho, 1887, be amended to read as follows: Sec. 2495. All property of the wife owned by her before marriage, and that acquired afterward by gift, bequest or descent, or that she shall acquire with the proceeds of her separate property, shall remain her sole and separate property, to the same extent and with the same effect as the property of a husband similarly acquired. Sec. 2. During the continuance of the marriage the wife has the management, control and absolute power of disposition of her separate property, and may bargain, sell and convey her real and personal property, and may enter into any contract with reference to the same in the same manner and to the same extent and with like effect as a married man may in relation to his real and personal property; provided, that the husband shall be

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bound by such contracts to no greater extent or effect than his wife under similar circumstances would be bound by his contracts." The act closes with section 5, which specifically repeals sections 2498 and 2499 of the Revised Statutes of 1887. It is contended by counsel for respondent that under the decisions in this state as announced prior to the adoption of the act of March 9, 1903, the plaintiff is not entitled to recover. (*Dernham v. Rowley*, 4 Idaho, 753, 44 Pac. 643; *Jaeckel v. Pease*, 6 Idaho, 131, 53 Pac. 399; *Strode v. Miller*, 7 Idaho, 16, 59 Pac. 893; *Holt v. Gridley*, 7 Idaho, 416, 63 Pac. 188.) Appellant contends, however, that the foregoing legislation so extended and enlarged the powers and corresponding liabilities of a married woman as to make respondent liable on the contract in question. This can best be determined by first ascertaining the purpose and extent of this latter legislation. First, it gives the wife the absolute control and management of her separate property and repeals section 2498 which had formerly given the management and control of her property to the husband. Second, it gives to the wife the sole and absolute power to sell and dispose of her separate property and carry on business therewith and make contracts in reference thereto and for the benefit thereof, and repeals section 2499 which provided for the appointment of a trustee to manage her separate property. In this respect *McDonald v. Rozen*, 8 Idaho, 352, 69 Pac. 125, is no longer the rule of law in this state. It is safe to say that a most careful examination and consideration of the act of March 9, 1903, will disclose no legislation nor legislative intent therein to in any respect change the wife's legal status with reference to any subject or matter other than her separate property. Prior to the amendment the husband was entitled to the custody, control and management of his wife's separate property, but now she is entitled to its custody and control and may sell and dispose of it without consulting him. She may also make any contracts she pleases with reference thereto. In all other respects the law of this state remains the same with reference

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to her contracts as it was when the above-cited cases were decided by this court. It should be borne in mind that all our legislation with reference to contracts, powers and liabilities of married women must be viewed and construed as grants instead of restriction of power and authority to contract.

In *Dernham v. Rowley*, *supra*, the question arose as to the power of the wife to bind herself to pay a debt contracted by the husband for his use and benefit, and this court speaking through Chief Justice Morgan said: "From this exposition it will clearly appear that in order to charge the separate property of the wife, or render it liable to levy and sale, it must be alleged in the complaint, and proven, that the debt was incurred for the use and benefit of her separate property, or was contracted by her for her own use and benefit."

In *Jaechel v. Pease*, *supra*, the question arose as to the power of the wife to bind herself on a debt contracted for the benefit of the community property, and this court, speaking through Justice Quarles, said: "A married woman cannot bind herself personally for the debt of her husband, or for a community debt, and it is error to render judgment jointly against the husband and wife on a note signed by both in the absence of a showing that the debt was created for the separate use and benefit of the wife, or for the use and benefit of her separate estate."

In *Strode v. Miller*, *supra*, the same principle was enunciated and *Jaechel v. Pease* was cited with approval.

In *Holt v. Gridley*, *supra*, a similar question was involved, and this court, speaking through Justice Sullivan, said: "It also appears that the defendants are husband and wife, and there is nothing in the record to show that her separate property is liable for the indebtedness sued on herein. Where it is sought to make the separate property of a married woman liable for debt, it must be alleged and proved that the debt is her own, or made on behalf of her separate property. The wife is not personally liable for the debts of her husband, and neither is her separate property."

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It follows from what we have already said that in order to bind Mrs. Bowers in this case it will be necessary for the plaintiff to show that the debt was contracted for the use or benefit of her separate property or for her own use or benefit, or in reference to the management, control or business transactions touching such property. There can no longer be any question in this state as to the power of a married woman to bind her separate property and estate for the payment of a debt. The nature of the argument advanced in this case, however, makes it necessary for us to observe that the mere representation by a *feme covert* that she owns a certain amount, class and character of property in her own name and right does not create a liability against her estate for a debt not contracted for her use or benefit or the benefit of such estate. In order to create a charge against her estate for such a debt, it must be made a charge *in rem* by a mortgage or pledge of the property or in some manner known to or recognized by the law as constituting a lien upon or charge against the specific property. It is not sufficient to furnish a list of property and say: "This is my separate property and I own it in my own name and right." It has been repeatedly held that a married woman who signs a promissory note with her husband for the payment of his debt and executes a mortgage on her property to secure the payment of the same, creates a liability only *in rem* and not *in personam*. The property encumbered is liable for the payment of the debt, but when exhausted, the obligation, as against the wife, is extinguished, and no personal liability attaches. (*Jaechel v. Pease* and *Strode v. Miller, supra.*) It is different, however, where the liability was originally the wife's debt or contracted with reference to her separate property and estate; or in the management and control thereof; or in the carrying on and transacting business therewith or in reference thereto. In the case at bar the obligation, if an obligation at all, is only *in personam*, as no property appears to have been mortgaged or encumbered or pledged for the payment of the debt.

Opinion of the Court—Sullivan, J., Concurring.

We have examined the evidence introduced on behalf of the plaintiff in this case very carefully, and while it is rather meager and slight, we think it is sufficient to bring the case within the rule announced at the present term in *Later v. Haywood*, ante, p. 78, 85 Pac. 494, where the court said: "On a motion by the defendant for nonsuit after the plaintiff was introduced his evidence and rested his case, the defendant must be deemed to have admitted all the facts of which there is any evidence, and all the facts which the evidence tends to prove." (See, also, *Simpson v. Remington*, 6 Idaho, 681, 59 Pac. 360; *Kansteiner v. Clyne*, 5 Idaho, 59, 46 Pac. 1019; *Lewis v. Lewis*, 3 Idaho, 645, 33 Pac. 38; *York v. P. & N. Ry. Co.*, 8 Idaho, 574, 69 Pac. 1042.) The debt sued on in this case might have been incurred for the use and benefit of the respondent or for the benefit of her separate estate, and still she might not have actually received and disbursed the money. It may, on the other hand, have been incurred entirely and solely for the use and benefit of her codefendant, Baldwin. The plaintiff, we think, introduced sufficient evidence to put the defendant to her proofs, and we shall therefore order a new trial. If the respondent can establish a defense that will bring her within the purview of the law as herein announced, she will defeat plaintiff's right of recovery; otherwise she will fail. The parties should have a full hearing on the merits of this case. Judgment reversed and a new trial granted. Costs awarded to appellant.

Stockslager, C. J., concurs.

SULLIVAN, J., Concurring.—I concur in the conclusion reached to the extent that a new trial should be granted, but am unable to concur in the conclusion that under the laws of this state a married woman cannot bind herself personally, for the payment of a debt that was not contracted for her own use or for the use or benefit of her separate estate.

Argument for Appellant.

(April 5, 1906.)

STATE, Respondent, v. JOHN WRIGHT, Appellant.

[85 Pac. 193.]

APPEAL WHEN DISMISSED—NOTICE OF INTENTION TO MOVE FOR NEW TRIAL—EFFECT—INSTRUCTIONS WHEN NOT OBJECTIONABLE—SUFFICIENCY OF EVIDENCE.

1. Under the provisions of section 7953 of the Revised Statutes, where a defendant serves and files his notice of intention to move for new trial, and states therein the grounds upon which his application is based, and the trial court or judge and respective counsel treat such notice as an application for a new trial, this court will so treat it, and not dismiss the appeal on the ground that a formal application was not made.

2. Evidence examined and held sufficient to sustain verdict.

3. An instruction that leaves the questions of fact to be found by the jury and only suggests the law applicable in case they find certain facts to exist, is not objectionable on the ground that it assumes that certain facts do exist.

4. Under the provisions of section 7877 of the Revised Statutes, it is not error for the court to refuse to instruct the jury to find the defendant not guilty; the court may advise the jury to acquit the defendant, but the jury is not bound by such advice.

(Syllabus by the court.)

APPEAL from the District Court of the Seventh Judicial District for Washington County. Hon. Frank J. Smith, Judge.

Defendant was convicted of the crime of grand larceny, and appealed from the judgment and order overruling a motion for new trial. *Affirmed.*

Frank Harris, for Appellant.

There being no evidence that the defendant was connected with the branding, there was no evidence of a taking by him. (*Black v. State*, 38 Tex. Cr. App. 58, 41 S. W. 606.)

Argument for Respondent.

In order to warrant a conviction of crime on circumstantial evidence, the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no one else, committed the offense charged. (*Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346, 37 N. E. 244; *State v. Nesbit*, 4 Idaho, 548, 43 Pac. 66; *State v. Burke*, 11 Idaho, 420, 83 Pac. 228.)

Instruction No. 11 is erroneous in that it assumes the existence of facts not proven; it assumes that there was evidence given that the defendant was seen in the possession of the property soon after it was stolen, while there is no such evidence in the record, neither is there any evidence as to when the animal was stolen, if ever stolen at all.

Instructions which assume that there is evidence before the jury tending to prove material facts, when in fact there is no such evidence, are improper and generally erroneous. (Hughes' Instructions to Juries, sec. 192, and cases there cited.)

The twelfth instruction is error for the reason the judge told the jury, in effect, what he understood the evidence to be on this point. (*People v. Mathai*, 135 Cal. 442, 67 Pac. 694.)

J. J. Guheen, Attorney General, and Edwin Snow, for Respondent.

The provision of section 7953 of the Revised Statutes has been wholly violated by the appellant in the motion for a new trial in the court below, and the appeal from the order overruling the motion for a new trial should be dismissed.

An application for a new trial must be made in a criminal action within ten days after verdict, and a notice of intention to move for a new trial is not an application for a new trial. (*State v. Smith*, 5 Idaho, 291, 48 Pac. 1060; *State v. Dupuis*, 7 Idaho, 614, 65 Pac. 65; *State v. Rice*, 7 Idaho, 762, 66 Pac. 87.)

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The bill of exceptions must be stricken from the files, because it was never settled, as a bill of exceptions to the order of court overruling the motion for a new trial, as provided in section 7944 of the Revised Statutes. (*State v. Smith*, 5 Idaho, 291, 48 Pac. 1060.)

The bill of exceptions cannot be retained and considered on the appeal from the judgment. (*Cosgrave v. Howland*, 24 Cal. 457; *Free v. Starr*, 13 Cal. 170; *Lower v. Knox*, 10 Cal. 480; *Burdge v. Gold Hill Water Co.*, 15 Cal. 198; *Williams v. Rice*, 12 Nev. 234.)

There is nothing before this court but an appeal from the judgment, with no statement on such appeal. That being the case, the court will assume that the evidence was sufficient to warrant the verdict, and will further assume that the trial court's charge to the jury was pertinent to the facts proved on the trial. (*People v. Williams*, 2 Idaho, 366, 16 Pac. 552; *People v. Woods*, 2 Idaho, 364, 16 Pac. 551.)

Even if the statement on motion for a new trial may be considered on the appeal from the judgment, the scope of review which could at most be had would be that provided for in section 7940 of the Revised Statutes. (See *State v. Smith*, *supra*.)

It was the duty of the court to refuse the peremptory instruction asked for by defendant to the effect that the jury find the defendant not guilty. (*Territory v. Neilson*, 2 Idaho, 614, 23 Pac. 537; *People v. Horm*, 70 Cal. 17, 11 Pac. 470.)

The instructions objected to, numbers 11 and 12, cannot be reviewed by the court, for the reason that these being instructions given by the court of its own motion, the record must show that they were excepted to before verdict. (*State v. Schieler*, 4 Idaho, 120, 37 Pac. 272; *State v. Hurst*, 4 Idaho, 345, 39 Pac. 554.)

STOCKSLAGER, C. J.—Appellant was charged with the crime of grand larceny in the district court of Washington county, to wit: "That the said John Wright on or about the fifteenth day of May, 1905, in the county of Washington,

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state of Idaho, then and there one bay horse, the same being the personal property of W. M. Pearson, did unlawfully and feloniously steal, take, lead and drive away—contrary to the form, force and effect of the statute in such cases made and provided, and against the power, force and dignity of the state of Idaho.”

To this information defendant plead not guilty; a trial was subsequently had, which resulted in a verdict of guilty. Defendant moved for a new trial, which was overruled. The appeal is from the order overruling the motion for a new trial and from the judgment. Learned counsel for appellant assigned two errors, to wit: 1. “That the court misdirected the jury in matters of law, and erred in the matter of decisions of questions of law arising in the trial of the cause.” 2. “That the verdict is contrary to law and the evidence.”

Counsel for respondent moved to dismiss the appeal from the order of the court denying a new trial, and also to strike the bill of exceptions from the record for the reason that appellant did not comply with section 7953 of the Revised Statutes of 1887, by making his application for a new trial within ten days after verdict. This section provides: “The application for a new trial may be made before or after judgment; and must be made within ten days after verdict, unless the court or judge extends the time.”

The verdict was rendered on November 1st, and on November 3d the defendant served and filed what is designated “notice of motion for new trial,” wherein he stated all the grounds upon which he thereafter moved the court for a new trial and addressed the notice to the district judge and the prosecuting attorney in and for Washington county. On the same date, the prosecuting attorney entered a stipulation with defendant’s counsel for an extension of time for a period of sixty days in which to prepare and present a bill of exceptions, and on the same date the trial judge made and entered an order to the same effect. It is clear and undisputable, we think, that the prosecuting attorney, district judge, and all parties to this action understood the so-called “notice of mo-

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tion for new trial" as amounting to an "application for a new trial" within the meaning of section 7953 of the Revised Statutes. Had they not so understood it, there would have been no use or object in granting an extension of time for the settlement of "a bill of exceptions and statement of the case on motion for a new trial" as was done by the trial court. The foregoing views are also re-enforced by the fact that the prosecuting attorney made no objection whatever to the consideration of defendant's motion for a new trial when the same was formally made, on the ground that the same had not been made within the statutory time. The contention which is here made by the attorney general for the first time in this court was never presented to the trial judge nor urged in any manner until the case was called for hearing in this court. We are admonished by section 8070 of the Revised Statutes that in the hearing of criminal cases on appeal "the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." This section has been time and time again invoked by this court against defendants who were relying on mere technical objections, and we can see no reason why the same statute is not as clearly applicable to and enforceable against the state when it urges a mere technical variance from the statutory requirements which appears neither to have misled nor prejudiced the rights of the people in any respect whatever. It is clear to my mind that the appeal from the order denying defendant's motion for a new trial should not be dismissed. Section 8056 of the Revised Statutes provides that "If the appeal is irregular in any substantial particular, but not otherwise, the appellate court may, on any day and term, on motion of the respondent upon five days' notice, accompanied with copies of the papers upon which the motion is founded, order it to be dismissed." The objection urged here does not amount to a substantial irregularity. It makes no difference what a party litigant calls a paper or document he files in legal proceedings; the court will look to the purpose, effect and object of the document.

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The notice given by defendant in this case advised the state beyond all peradventure that he would formally move for a new trial as soon as he could get his bill of exceptions and statement prepared and settled. And in pursuance of this notice, he prepared, served and presented his statement, procured the settlement of the same, and thereupon made his formal motion for a new trial. The rule announced in *State v. Smith*, 5 Idaho, 291, 48 Pac. 1060, will be so modified as to hold that where a notice of intention to move for a new trial is made within the statutory time and contains the grounds of the application and is treated by the trial court and respective counsel as an application for new trial, it will be so treated on appeal.

The insufficiency of the evidence to sustain the verdict is assigned as error. On an examination of the evidence we conclude that there was sufficient to support the verdict.

The giving of instructions 11 and 12 is assigned as error. Instruction 11 is as follows: "Possession of property recently stolen is not evidence sufficient of itself to warrant a conviction. It is merely a circumstance to show guilt, which, taken in connection with other evidence, is to determine the question of guilt. If, however, the jury believe, beyond a reasonable doubt, that the property described in the information was stolen, and was seen in the possession of the defendant shortly after being stolen, the failure of the defendant to account for such possession or to show that such possession was honestly obtained, is a circumstance tending to show his guilt; and the defendant is called upon to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such."

The twelfth instruction reads: "The court instructs you that in order to find that the property described in the information was in the possession of the defendant, for the reason that it was found in the possession of Zibe Morse and Thomas Jackson, if you find that it was in their possession, then you must find that the said Zibe Morse and Thomas Jackson were au-

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thorized and directed by the defendant to take possession of said property described in the information for and on behalf of said defendant, and as the property of said defendant." We think that those instructions correctly state the law, and there was no error in giving them. They should not, however, be used as a model, as they are not as clear as they might be drawn, and might tend to confuse. The court does not assume by either instruction that the evidence shows any particular fact; both are conditional, and leave the question of fact in each instance for the jury to determine, and suggest the law to be applied in case they find certain facts to exist.

Counsel for appellant also submitted a peremptory instruction for the consideration of the court to be given to the jury, which was in effect to return a verdict of not guilty, and urges that the court erred in not giving this instruction. There are two reasons why the court did not err in refusing to give that instruction: 1. In criminal cases, the court is not authorized to direct the jury to return a verdict of not guilty, but may so advise, which advice the jury may decline to follow. (Rev. Stats., sec. 7877; *Territory v. Neilson*, 2 Idaho, 614, 23 Pac. 537.) And, 2. The evidence was sufficient to sustain the verdict.

The judgment is affirmed.

Ailshie, J., and Sullivan, J., concur.

(April 11, 1906.)

F. C. SMITH et al., Appellants, v. THE MOUNTAIN GULCH MINING AND MILLING COMPANY (a Corporation) et al., Respondents.

[85 Pac. 918.]

ANNUAL ASSESSMENT WORK ON MINING CLAIMS.

1. Under the evidence in this case, held, that the annual assessment work on the quartz mining claims located and known as the "Mother Lode," the "Northeastern Extension of the Mother Lode" and "Canary" mining claims for the year 1902, was done.

(Syllabus by the court.)

APPEAL from District Court of the Second Judicial District for Latah County. Hon. Edgar C. Steele, Judge.

Action to quiet title to mining claims. Judgment for the respondents. *Affirmed.*

George G. Pickett, for Appellants.

Forney & Moore, for Respondents.

Counsel cite no authorities on point decided by the court.

SULLIVAN, J.—This action was brought by the appellants Smith and Robins against the Mountain Gulch Mining and Milling Company, and Chas. G. and John H. Taylor, respondents, on May 10, 1904, to quiet title to the "Eureka," "Nonpareil" and "Excelsior" quartz mining claims, situated in Hoodo Mining District, Latah county, Idaho. It appears from the record that said Chas. G. and John H. Taylor, located the "Mother Lode" and the "Northeastern Extension of the Mother Lode" mining claims in said district in June, 1898, and thereafter, in the month of September, 1899, the said John H. Taylor located the "Canary" quartz mining claim, and that between the dates of the original location of these mining claims and the institution of this suit, the re-

Opinion of the Court—Sullivan, J.

spondent, The Mountain Gulch Mining and Milling Company, a corporation, was duly organized under the laws of the state of Washington, and acquired whatever interest the said Taylors had in and to said mining claims. It appears from the record that since the location of said mining claims the respondents have occupied and worked the aforesaid mining claims each year, and had expended about \$6,000 thereon in erecting a mill, cabins, shops, making roads and trails, and driving tunnels and inclines thereon. In the month of February, 1903, the appellants, Smith and Robins, went upon the said "Mother Lode" mining claim, and the "Northeastern Extension" thereof, and the "Canary" mining claim and located the identical ground covered by said locations in the name of the "Eureka," "Nonpareil" and "Excelsior." Their reason, as shown by the record, for making said locations, was that the annual assessment work on said "Mother Lode" and "Northeastern Extension" thereof, and the "Canary," had not been done by the respondents for the year 1902. On the trial of the case, evidence was submitted on two issues, to wit: 1. That no valid location had been made by the respondents; and 2. That the annual assessment work for the year 1902 had not been performed. Both issues were found in favor of the respondents, and judgment was entered in their favor. A motion for a new trial was denied, and this appeal is from the order denying such motion. The question as to the validity of the locations made by respondents was abandoned, and the only question presented for decision on this appeal is whether the annual assessment work for the year 1902 had been performed. It is contended by counsel for appellants that the evidence clearly shows that the respondents performed sixty-six days' work upon said three claims for the annual assessment work for the year 1902. He also contends that the evidence shows that the wages for such labor was at most but \$3.50 per day, and therefore \$300 worth of work was not done in the year 1902 on said claims.

It appears from the evidence that in the year 1902 the respondents made the equivalent of forty-seven feet of tunnel

Points Decided.

and incline, and the evidence shows that said work was worth \$9 per foot, or \$423. The appellant's witness, Northrup, testified that he had worked on the said "Mother Lode" claim, and had a contract there for forty-five feet of tunnel; that he received \$9 per foot for that work, and "that he earned his money; that it was well worth \$9 per foot." There is some other evidence to show that said work was not worth more than \$7 or \$8 per foot. But even at \$7 per foot, forty-seven feet of tunnel would cost \$329; thus at the lowest estimate there was more than \$300 worth of work done on said claims in the year 1902, by the respondents. The trial court found that more than \$300 worth of work had been done that year, and we think the evidence fully supports the finding of the court on that point. The judgment is affirmed, with costs in favor of the respondents.

Stockslager, C. J., and Ailshie, J., concur.

(April 11, 1906.)

CALIFORNIA CONSOLIDATED MINING COMPANY,
Respondent, v. CHARLES MANLEY, Sheriff of Shoshone County, and ALBERT G. KERNS, Receiver of the Property of the Coeur d'Alene Bank, Appellants.

[85 Pac. 919.]

APPEAL DISMISSED WHEN.

1. When the transcript on appeal has not been filed with the clerk of this court within the time provided by the rules, and it does not appear that an extension of time has been granted, a motion to dismiss the appeal will be sustained.

(Syllabus by the court.)

APPEAL from the District Court of the First Judicial District for Shoshone County. Hon. R. T. Morgan, Judge.
Appeal dismissed.

Opinion of the Court—Stockslager, C. J.

J. H. Forney, for Appellant, cites no authorities on point decided.

A. H. Featherstone and Charles Lund, for Respondent, cite no authorities on point decided.

STOCKSLAGER, C. J.—Respondent moves to dismiss the appeal in this case on the ground that the transcript was not filed with the clerk within the time required by the rules of this court. In support of this motion they file the certificate of the clerk of the district court of Shoshone county, in which he certifies that a “final judgment dated July 24, 1905, in conformity with a decision rendered by the supreme court of Idaho, rendered May 8, 1905, was filed and recorded in the above-named court in the above-entitled action on August 1, 1905; that a notice of appeal therefrom to the supreme court of the state of Idaho and an undertaking on appeal in due form for \$300 costs, were filed October 6, 1905, by plaintiff; that plaintiff’s praecipe for a transcript of the record for use on appeal was filed November 21, 1905, and on November 24, 1905, a duly certified transcript of the record on appeal was furnished plaintiff.”

Upon the foregoing certificate, and it not appearing that an extension of time to prepare and file a transcript had been granted, the motion to dismiss the appeal is sustained. Costs to respondent.

Ailshie, J., and Sullivan, J., concur.

Argument for Appellants.

(April 12, 1906.)

JOSIAH HILL and J. S. HILL, Appellants, v. THE STANDARD MINING COMPANY, RICHARD WILSON, WALTER MACKAY, JAMES LEONARD, WILLIAM R. LEONARD, and A. L. SCOFIELD, Copartners Doing Business Under the Firm Name of the MAMMOTH MINING COMPANY, Respondents.

[85 Pac. 907.]

ACTION FOR DAMAGES—WHEN COMPLAINT IS SUFFICIENT—COSTS.

1. When a complaint states fully and concisely the nature of the damage, amount, and that it was caused by the unlawful, wrongful and negligent acts of the defendant, *held*, that it states a cause of action.

2. When an appeal is prosecuted from a judgment on an order sustaining a demurrer to the complaint, no costs can be awarded to appellant, excepting the necessary costs in presenting such appeal.

(Syllabus by the court.)

APPEAL from the District Court of the First Judicial District for Shoshone County. Hon. R. T. Morgan, Judge.

Plaintiffs sued for \$12,000 damages. Defendants demurred; demurrer sustained. Judgment for costs in favor of respondent. *Reversed*.

A. G. Kerns, for Appellants.

The complaint shows a continuing, growing and destructive public nuisance, specially injurious to plaintiffs, and threatening to become more destructive, and the cause of action is stated in plain and concise language. A complaint need not negative the lawfulness of an obstruction or its continuance, or that it was unavoidable. These are matters of defense to be set up by answer. (Gould on Waters, sec. 122; Estee's Pleadings, sec. 2025; *Wolf v. St. Louis Ind. Water Co.*, 15 Cal. 319.)

Argument for Respondents.

It may be convenient or economical for an operator to throw the refuse of his mines into a stream; but that is not enough. He is bound to consider the rights of others. He takes the risk of injuring others to save trouble and expense to himself. (2 Lindley on Mines, 840.)

The doctrine of the authorities is that each mine owner or proprietor must take care of his own mining debris, and he can acquire no right, by custom, or otherwise, to use the land of his neighbor as a dumping ground, without his consent, either by carrying and depositing the debris thereon, or by casting it into the stream and allowing it to be washed down by the force of the current. (*Carson v. Hayes*, 39 Or. 97, 65 Pac. 814; *Fitzpatrick v. Montgomery*, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416; *Hobbs v. Amador & S. C. Co.*, 66 Cal. 161, 4 Pac. 1147; *Elder v. Lykens Valley Coal Co.*, 157 Pa. St. 490, 37 Am. St. Rep. 742, 27 Atl. 545; *Pompelly v. Green Bay Co.*, 13 Wall. 166, 20 L. ed. 557.)

The injury is a continuing one, covering a period of several years, and still existing and growing.

Lapse of time bars a recovery for a completed offense only. (*Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513.)

The statute of limitations must be pleaded by answer. (Rev. Stats., sec. 4213.)

Laches is a matter of defense to be pleaded by the respondents. And it is only when, by the delay and neglect to assert the right, the adverse party has been lulled into doing that which he otherwise would not have done, or into omitting to do that which he otherwise would have done, had the right been promptly asserted, that laches will be considered as a defense. (*Carson v. Hayes*, 39 Or. 97, 65 Pac. 814, 817.)

C. W. Beale, for Respondents.

Where a nuisance is of a permanent character, any damage that may result therefrom is an original damage, and may be at once fully compensated, and the statute of limitations immediately begins to run on any action for damages. (*Powers*

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v. Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792; *Stodghill v. Chicago etc. R. Co.*, 53 Iowa, 341, 5 N. W. 495; *Chicago etc. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460; *Chicago etc. R. Co. v. McAuley*, 121 Ill. 160, 11 N. E. 67; *Bizer v. Ottumwa Hydraulic Power Co.*, 70 Iowa, 145, 30 N. W. 172; Gould on Waters, sec. 416; *Barnard v. Shirley*, 135 Ind. 547, 41 Am. St. Rep. 454, 34 N. E. 605, 35 N. E. 117.)

When the members of the convention that framed our constitution incorporated therein that in organizing mining districts the use of the public waters for mining and milling purposes should be a preferential use, they recognized thereby the absolute necessity of the use of such waters in concentrating plants.

For any injury that may result from the exercise of a lawful right, the law does not offer any relief. (3 Elliott on Evidence, sec. 1971.)

Where the maxim (*sic utere tuo ut alienum non laedas*) is applied to landed property, it is subject to a certain modification, it being necessary for the plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land. (*West Cumberland Iron Co. v. Kenyon*, L. R. 6 Ch. Div. 773; *Penn. Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. St. Rep. 445, 6 Atl. 457; *Barnard v. Shirley*, 135 Ind. 547, 34 N. E. 604, 35 N. E. 117.)

This court has repeatedly held that in damage cases it is necessary not only to plead and prove negligence on the part of the defendant, but also to plead and prove a want of negligence on plaintiff's part. Applying that ruling to the case at bar the pleadings of the plaintiffs in the lower court never stated a cause of action. (*Haner v. Northern Pacific R. Co.*, 7 Idaho, 305, 62 Pac. 1028; *Sheldon v. Rockwell*, 9 Wis. 166, 76 Am. Dec. 265.)

A court of equity declines to exert its powers to relieve one who has been guilty of laches. (*Whitney v. Fox*, 166 U. S.

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637, 647, 648, 41 L. ed. 1145, 17 Sup. Ct. Rep. 713; *Güldersleeve v. New Mexico Min. Co.*, 161 U. S. 573, 582, 40 L. ed. 812, 16 Sup. Ct. Rep. 663; *Abraham v. Ordway*, 158 U. S. 416, 423, 39 L. ed. 1036, 15 Sup. Ct. Rep. 894; *Ware v. Galveston City Co.*, 146 U. S. 102, 116, 36 L. ed. 904, 13 Sup. Ct. Rep. 33; *Foster v. Mansfield Cold Water etc. R.*, 146 U. S. 88, 102, 36 L. ed. 899, 13 Sup. Ct. Rep. 28; *Hoyt v. Latham*, 143 U. S. 553, 36 L. ed. 259, 12 Sup. Ct. Rep. 568; *Hanner v. Moulton*, 138 U. S. 486, 495, 34 L. ed. 1032, 11 Sup. Ct. Rep. 408; *Richards v. Mackwell*, 124 U. S. 183, 189, 31 L. ed. 396, 8 Sup. Ct. Rep. 437; *Penn. Mutual Life Ins. Co. v. Austin*, 168 U. S. 685-697, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 37 L. ed. 1049, 14 Sup. Ct. Rep. 78; *Mackall v. Cassilear*, 137 U. S. 556, 34 L. ed. 776, 11 Sup. Ct. Rep. 178; *Galliher v. Cadwell*, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; *Willard v. Woods*, 164 U. S. 502, 41 L. ed. 531, 17 Sup. Ct. Rep. 176.)

Whatever title the plaintiffs have in their land is subject to the vested water rights of the respondents and their use of such waters in their mining and milling operations; and said plaintiffs cannot be heard to complain at this time. They not only had personal knowledge of what the respondents were doing, but whatever title they may have to the premises, under the act of Congress, and the decision of the supreme court interpreting the same, is subject to the vested and accrued rights of said respondents to continue in their mining and milling operations unhampered and undisturbed. (*Broder v. Water Co.*, 101 U. S. 276, 25 L. ed. 790.)

To entitle plaintiffs to recover for injuries sustained from a public nuisance, they must first allege in their complaint facts clearly showing that they have sustained special or peculiar damages—damages different in kind and character from the rest of the public, so that such damage cannot fairly be said to be a part of the common injury resulting from such nuisance. (*Stufflebeam v. Montgomery*, 2 Idaho, 763-770, 26 Pac. 125.)

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STOCKSLAGER, C. J.—This is an appeal from a judgment rendered and entered on an order sustaining a demurrer to the complaint. It was the third effort of learned counsel for appellant to allege a cause of action against the defendants for damages to their lands located on the South Fork of the Coeur d'Alene river in Shoshone county. The complaint alleges:

"1. That at all the times hereinafter mentioned, the defendant, Standard Mining Company, was, and now is, a corporation duly organized and existing under the laws of the state of Idaho.

"2. That at all the times hereinafter mentioned the defendants were copartners doing business under the firm name of the Mammoth Mining Company.

"3. That during the three years prior to the commencement of this action the defendants, as such mining partners, cast about five hundred and fifty thousand tons of waste material, consisting of rock, earth, sand, stone, slime and poisonous substances of lead and arsenic, into Canyon creek, a tributary of the South Fork of the Coeur d'Alene river, ten miles above the lands of the plaintiffs hereinafter described, thereby filling the banks and polluting and defiling said stream; and by the natural flow of waters of said Canyon creek said waste material so negligently cast into said stream by the defendants has been washed, carried, and deposited into the South Fork of the Coeur d'Alene river aforesaid, thereby polluting and defiling said stream and filling the banks thereof; and by the natural flow of the waters of said river said waste material has been washed and carried down said stream, and thereby causing the waters of said South Fork of the Coeur d'Alene river, at high water, during the aforesaid period of three years, prior to the commencement of this action, to overflow the natural banks of said stream where the same passes over, along, through and across the lands of plaintiffs hereinafter described, and wash, carry, spread and deposit over and across the said lands of the plaintiffs portions of said waste material so cast into Canyon creek by the defendants as aforesaid.

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thereby poisoning the said lands of the plaintiffs, so covered with waste, for agricultural, grazing, farming, townsite and residence purposes, and poisoning and rendering the well water on said premises unfit for any use, and killing and blasting fruit trees, vines, groves and other vegetation thereon, and rendering the use and occupation of said premises as a home dangerous to the health of the plaintiffs.

“4. That the plaintiffs are now, and at all the times since the month of March, 1886, have been, in the possession and entitled to the possession of and the owners of the following described parcels of land situated along, contiguous and adjacent to said South Fork of the Coeur d’Alene river, to wit”: Here follows full description of plaintiffs’ land.

The defendants, Standard Mining Company, James Leonard, and A. L. Scofield, demurred to this complaint, to wit:

“1. That said amended complaint does not state facts sufficient to constitute a cause of action.

“2. That said amended complaint is uncertain in this:

“(a) That it does not state any facts constituting carelessness or negligence or unskillfulness on the part of the said defendants, or any or either of them or on the part of any authorized agent or representative of said defendants or any or either of them.

“(b) That it does not state any act or admission on the part of said defendants, or any or either of them, or on the part of any authorized agent or representative of said defendants, or any or either of them, constituting negligence or carelessness.

“(c) That it does not appear therefrom of what value the lands mentioned therein were for agricultural, grazing, farming, townsite or residence purposes, or of what value said lands were for any purpose whatever.

“(d) Nor does it appear therefrom when or during what years any of the waste material mentioned therein was washed, carried, spread or deposited over, upon or across the lands of the plaintiffs mentioned therein, or how much

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damage, if any, was caused thereby to the lands, or how much to the vegetation growing thereon.

“(e) Nor does it appear therefrom the date when said lands or any thereof were poisoned or destroyed for agricultural, grazing, farming, townsite or residence purposes, or the date when the fruit trees, vines, groves or other vegetation growing thereon, were killed and blasted, or the date when said premises were rendered unfit or dangerous as a home, or unfit or dangerous at all.

“(f) Nor does it appear therefrom the date when any of said lands were injured, poisoned or destroyed or the date when any crops or vegetation whatever growing thereon were injured or destroyed, or killed or blasted, prior or subsequent to the date of the injury or destruction of said lands or any part thereof.

“(g) Nor does it appear therefrom how said lands could be poisoned or destroyed and at the same time be of any value for agricultural, grazing or other purposes whatever, or how any crops, vegetables, fruit trees, vines or groves could be killed, poisoned, blasted or destroyed upon said lands subsequent to the date of the destruction thereof.

“(h) Nor does it appear therefrom what damage, if any, the lands of the plaintiffs suffered by the casting of waste material into Canyon creek; how much by the overflow of the South Fork of the Coeur d’Alene river; how much by the pollution of the waters of the South Fork of the Coeur d’Alene river; or how much by the high water of the said South Fork of the Coeur d’Alene river.

“Wherefore, said defendants pray the judgment of this honorable court that they be dismissed hence with their costs in this behalf sustained.”

The complaint above referred to was filed June 30, 1905. The demurrer and affidavit of service thereof were filed July 6, 1905, and judgment for costs entered December 16, 1905, the above demurrer having been theretofore sustained.

By the record it is shown that the first complaint in the action was filed September 30, 1903, in which practically

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the same allegations are contained as are shown by the third amended complaint which is before us for determination as to its sufficiency for a recovery of damages. After innumerable motions to quash the summons and service thereof, together with affidavits in support of the various motions, also motions to quash and set aside the alias summons and the service thereof with affidavits in support thereof, extending from page 15 to 85 of the record, the defendants demurred to the complaint; this demurrer was filed June 21, 1904, and sustained December 30, 1904. On the thirty-first day of December, 1904, plaintiffs filed what is termed their second amended complaint, in which all the allegations of the complaint and the amended complaint are alleged together with some additional allegations. A motion to strike this complaint from the files was overruled on the twenty-ninth day of May, 1905. On the twelfth day of June, 1905, a demurrer was filed, which was sustained on the twenty-second day of June, 1905, and plaintiffs given until June 30, 1905, in which to file an amended complaint. On that date plaintiffs filed their third amended complaint, the sufficiency of which is now under consideration. The reasons for the history of this case, together with the various motions, demurrers, rules and orders, will hereafter be discussed in this opinion.

After a statement in justification of all the rulings of the court with reference to its actions in quashing summons, alias summons and other orders made in the earlier history of this case, learned counsel for respondents say:

“We next come to the only question involved in this appeal, and that is as to the right of the appellants to maintain their alleged cause of action against respondents.”

An inspection of the record, pleadings and proceedings in this case leads us to the conclusion that this statement is correct. In other words, if the appellants are entitled to recover damages in any amount, the complaint is sufficient to put defendants on their proofs, and the demurrers should have been overruled and defendants required to answer.

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It is earnestly urged by counsel for respondents that if this court should hold that there is error in sustaining the demurrers to the complaints, or either of them, it would result in "the depopulation of Shoshone county, the abandonment of all mining and milling therein, and the consequent bankruptcy of the inhabitants thereof." Deplorable as this might be—if true—it furnishes no excuse for the court to shirk its responsibilities in disposing of the question before us on its merits. The law is no respecter of persons, corporations or individuals, and in its creation and enforcement reaches out and protects the lone settler in his rights, let them be ever so meager, as well as the capitalist, the corporation or individual with its or his millions. If the law protects the appellants in their settlement on the public domain of the lands described in plaintiff's complaint for agricultural or other purposes, then their rights are as sacred and require the same application of the law and the same protection as is guaranteed to every citizen of this great nation and commonwealth. The law does not measure the rights of litigants by the amount involved, nor the manner in which it may affect others not parties to the litigation. It only deals with the questions as presented by the pleadings, and in this case if the plaintiffs can recover under any conditions or circumstances, then that right to recover cannot be measured by the damage defendants or others residing in Shoshone county may sustain by reason thereof. It is not a matter of sentiment, but what is the standing of the plaintiffs as shown by the pleadings, and have the defendants trespassed upon any rights guaranteed to them by the constitution and laws of our state? With this view we will examine the law applicable to the cause.

Mr. Gould, in his excellent work on Waters, section 122, says: "The general rule is that individuals are not entitled to redress against a public nuisance. The private injury is merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate

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actions in favor of private persons. If, however, a public nuisance, such as an unlawful obstruction to a common passage, causes peculiar damage to an individual, he may maintain an action therefor. In such case, the declaration or complaint need not negative the lawfulness of the obstruction, or its continuance for a reasonable length of time, or that it was unavoidable because of inevitable accident, these being matters of defense to be set up by answer. But the particular damage is the gist of the action, and must be specially set forth in the declaration or complaint." This seems to us to be a very clear and concise statement of the law and is founded in justice and reason. Applying the rule laid down by this learned author to the case at bar, we find the appellants in the undisputed possession of the property described in their complaint, that said property is rendered valueless for agricultural, grazing, farming, townsite and residence purposes, poisoning and rendering the well water unfit for use, killing and blasting fruit trees, vines, grass and other vegetation thereon, and that plaintiffs were in such possession of said premises in March, 1886, and are at the present time in quiet and peaceable possession.

Counsel for respondents cites section 3, article 15, of our constitution, which reads: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose. And those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district, those using the water for mining purposes, or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural pur-

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poses.” We cannot see the application of this provision of our constitution to the case at bar. Appellants do not complain of the use of the waters of Canyon creek by respondents for mining and milling purposes. The complaint is that respondents cast enormous quantities of debris and poisonous substances into Canyon creek which follows the channel of that stream down to its confluence with the South Fork of the Coeur d’Alene river, and thence carried down that stream and deposited on the lands of plaintiff, thus causing the injury for which they ask to be compensated in damages. There is nothing in this provision of the constitution, nor in any of its provisions, that authorizes or permits parties engaged in mining or any other occupation to fill up the natural channel of any of the public streams of the state to the injury of any other user of the waters of the stream. Our constitution wisely provides that all the public waters of the state and their use shall be under the control of the state. (Art. 15, sec. 1.)

Counsel for respondents, with commendable energy and force, both in his brief and oral argument, insists that his clients were exercising a lawful right granted them by the constitution and laws of the state in the use of Canyon creek as a dumping ground for the debris of their mines, and in support of this theory quotes all of section 1971, volume 3, of Mr. Elliott’s excellent work on Evidence. If the contention of respondents is to be accepted as the law of this state—that is, that they have the right to use the public streams as a dumping ground for the debris of their mines—then this learned author sustains their contention. It will be observed that the text is based wholly on the theory that “such injury resulted to the complainant from the proper and careful exercise of a lawful right on the part of defendant.” The author further says: “This rule has been variously stated as follows: An act done under a lawful authority, if done in a proper manner, will not, as a general rule, subject the party doing it to an action for the consequences which may follow from it.” If it was the

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intention of the framers of our constitution when they provided that "in organized mining districts those using water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes," that the mine or mill owner should have exclusive use not only of the water, but the stream for dumping the debris of their mines and mills irrespective of the damage it might cause to others with vested rights in the waters of such stream, then the plaintiffs could not frame a complaint that would not be subject to demurrer. The question of the preference right of the mine or mill owner over the manufacturer or agriculturist to the use of water has never been before this court to our knowledge, and in this case plaintiffs do not question the right of the defendants to the use of the waters of Canyon creek for mining and milling purposes; the complaint is that they cast large quantities of debris and poisonous substances from their mines and mills into Canyon creek, which, by natural consequences, flow down that stream and finally over and upon their lands, which by reason thereof are rendered valueless. Hence it is not a question as to who shall have the preference right to the use of the water between the parties to this action, but how shall the respondents use it, or have they the right to dump the waste from their mines and mills into the stream regardless of the results to lower occupants of the lands for agricultural or other purposes. This court has repeatedly held that an appropriator could not change his place of diversion of the waters of any stream if such change in any manner affected a lower appropriator of the waters of such stream, even though the lower appropriator be subsequent in right. The reasons for such conclusion, it seems to us, are well founded. Where the lower appropriator makes his appropriation he has the right to assume the upper appropriator will continue the use of the water as he found it, and if any change would damage him in the use of his appropriation, the courts will protect him in his rights.

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When respondents located their mines and erected their mills on or near Canyon creek and began to cast the waste from either into such stream, they assumed all risk of damages to anyone below on that stream or any stream to which it is tributary who were in possession of property that might be damaged by such use of such stream at the time they began the use thereof for such purpose. It is urged that it is not shown by the complaint that appellants ever made an appropriation of the waters of Canyon creek or the South Fork of the Coeur d'Alene river of which it is tributary. Appellants are not complaining that they have been deprived of their use of water by respondents; they complain of the wrongful use of Canyon creek by respondents, not of the water, but of the stream for dumping purposes. So far as the record shows, appellants' land may produce crops by subirrigation, hence never necessary to make an appropriation of any of the waters of the streams. In support of his contention that respondents have the right to use Canyon creek for dumping their waste from their mills and mines, counsel cites *Gibson v. Puchta*, 33 Cal. 310. In this case all the land in controversy was mineral land; one party cleared off a portion of his claim and planted it to potatoes; in the irrigation of his crop the water percolated through and into the mining tunnel of plaintiffs, and they sought to restrain him from such use of his land. The court says: "The defendant had the undoubted right to cultivate and plant this tract of land; and having planted it, there can be as little question that he had the same right to irrigate it for the purpose of maturing his crop. In irrigating his land the defendant is subject to the maxim, '*Sic utere tuo ut alienum non laedas.*' An action cannot be maintained against him for the reasonable exercise of his right, although an annoyance or injury may thereby be occasioned to the plaintiffs. He is responsible to the plaintiffs only for the injuries caused by his negligence or unskillfulness, or those willfully inflicted in the exercise of his right of irrigating his land." The facts in this case differ very materially from the case at bar. De-

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fendant had a lawful right to plant and cultivate his crops, so says the court, and he could only be held for a willful, negligent or unskillful manner of handling the water used for such purpose. If, in the case at bar, it were shown by the complaint that respondents were using the waters of Canyon creek for mining and milling purposes, that after such use the water percolated back into the creek, carrying sediments or debris of any kind with it, and plaintiffs' lands were injured by such use of the water, it is possible that a demurrer should be sustained, unless it is shown that such use was willful and negligent. Counsel calls our especial attention to *Bernard v. Shirley*, 135 Ind. 547, 41 Am. St. Rep. 454, 34 N. E. 605, 35 N. E. 117. He says this case "supports in every detail the position taken by counsel for the respondent." We reproduce his entire quotation: "The foregoing case of *Coal Co. v. Sanderson* and the reasoning of the court seem to be clearly in point with the case at bar. In both cases the owners cause water to rise from the earth, to become foul, and then to be carried by an artificial drain, and discharged into a running stream, the natural water-course of the basin or valley in which the water rises, and into which stream the water would naturally flow if left to itself. In both cases the owners were engaged in a lawful and necessary work of great advantage to mankind at large, and particularly to the community in which they operated; the one in mining out of the earth and distributing coal for heating and industrial uses, and the other also taking out of the earth mineral water for healing and curing the infirm. Both were free from fault or negligence in conducting their business, and in avoiding, so far as possible, all injury to others; the injury in each case being but the necessary incident of a lawful business. In each case there was no other place but the stream for the water to go, so that, if it were unlawful to discharge the water into the stream, then the enterprise itself would be at a standstill, and a lawful business thus come to an end because it could not be lawfully carried on." We have no such facts before us as were dis-

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closed and described in the above quotation. If the facts do exist in this case, in order that it may be brought within the rule laid down above, it can only be done by answer. A statement of the existence of such facts in a demurrer or orally by counsel for respondents will not answer the allegations of the complaint, hence these authorities have no application in the present status of this case.

Again, counsel quotes from a decision of Judge Beatty in *McCarty v. Bunker Hill and Sullivan Min. etc. Co.* Counsel says: "This is what Judge Beatty had to say upon a decision rendered by him last June in a denial of an application for a restraining order to close the mines and mills of Shoshone county: 'Without detailing the reasons, such order would mean the closing of every mine and mill, of every shop, store, or place of business in the Coeur d'Alenes. There are about twelve thousand people, the majority of whom are laboring people dependent upon the mines for their livelihood; not only would their present occupation cease, but all these people must remove to other places, for the mines constitute the sole means of occupation, and when they finally close, Wallace and Wardner, Gem and Burke and their surrounding mountains will again become the abode only of silence and wild fauna.' Any court must hesitate to so act as to bring such results.'" We are not informed of the precise question that was before Judge Beatty, only as stated by counsel for respondent. It will be observed from this statement that it was an "application for a restraining order to close the mines and mills of Shoshone county." No such application is before us; no prayer or demand that the mines and mills of Shoshone county be closed, or that respondents be enjoined from running their mills and mines.

Counsel for respondent insists that the complaint is lacking in a charge of willful or negligent acts on the part of respondents. We find in paragraph 3 of the complaint before us, after stating that respondents had "cast about five hundred and fifty thousand tons of rock, earth, etc., into Canyon creek, a tributary of the South Fork of the Coeur d'Alene

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river, about ten miles above the lands of the plaintiffs herein-after described, thereby filling the banks and polluting and defiling said stream; and by the natural flow of the waters of said Canyon creek said waste material so negligently cast into said stream by the defendants has been washed, etc.," down to and upon plaintiffs' land, causing damage in the sum of \$12,000. No intimation that they want to enjoin the operation of the mines and mills, but a demand that they be paid for damages they have sustained by the operation of such mills and mines, and there is an allegation that the debris from such mills and mines was negligently cast into a natural stream of the state; that they have been damaged thereby. And again, in paragraph 7 of the complaint it is alleged that defendants "have wrongfully, and unlawfully, etc., cast and deposited rock, earth, stone, tailings, slime and poisonous substances, etc., into said Canyon creek."

Counsel next cites *Haner v. Northern Pac. Ry. Co.*, 7 Idaho, 305, 62 Pac. 1028. This was an action against the defendant for the value of a cow alleged to have been negligently killed by one of defendants' locomotives. The complaint alleges that "the cow was killed because of the negligent and careless running of a locomotive and train of cars." The first clause of the syllabus says: "Where the complaint alleges negligence only in the running, managing and operating a locomotive and train of cars, the right of recovery is limited to the negligence alleged." Applying this rule to the case at bar, all that can be claimed for it is that the plaintiffs would be confined in their proofs to the allegation of negligence as used in the complaint, and we have already said the allegation of negligence was sufficient as used in the complaint. If respondents are able to establish by proof all the facts they set up in their demurrer they may be able to convince a jury that the plaintiffs should not recover, but in our view of the case it will be necessary for them to answer the complaint and meet the issue in that way rather than by demurrer. We are not without authority in this conclusion.

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In *Drake, Exr. of McKirk, Deceased, v. Lady Easley Coal etc. R. Co.*, an Alabama case reported in 102 Ala. 501, 48 Am. St. Rep. 77, 14 South. 749, 24 L. R. A. 64, the question discussed and decided was very similar to the one before us. The court held that "the pollution of the waters of a stream by washing iron ore, whereby the water is laden with refuse and debris, rendering it unfit for stock and drinking purposes, and causing the deposit of a sediment upon portions of the farm of a lower proprietor, is an actionable injury to such proprietor." This quotation is from the first clause of the syllabus and is fully borne out in the opinion. In the body of the opinion it is said: "It is not more agreeable to the laws of nature that water should descend than it is that lands should be farmed and mined. The plaintiff had no right to insist upon his receiving waters which nature never appointed to flow there." It is further said: "Under the provisions of the constitution, private property cannot be taken for public use or for corporations without just compensation being first made to the owner, except by consent. The courts—and it was never intended to be otherwise understood—are not 'masons' to 'chisel' away vested rights of property or private individuals, however humble or obscure the owner, for the benefit of the public or great corporations. It is the pride of this republic that no man can be deprived of his property without due process of law, and the poorest citizen can find redress for an unlawful injury caused by his wealthy neighbor by appealing to the courts of his county."

A large number of cases supporting this contention are cited in the footnote entitled, "How far stream may be polluted for mining purposes."

Mr. Lindley in his valuable work on Mines, at section 843, says: "While the deposit of mine tailings in running streams to a reasonable extent is permitted, subject to the limitations outlined in the preceding sections, the doctrine never has been extended so as to authorize the miner to flood his neigh-

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bor's lands, and by depositing thereon mining debris and 'slickens' deprive such neighbor of any substantial right or depreciate the value of his property." Again, "No person, natural or artificial, has a right, directly or indirectly, to cover his neighbor's land with mining debris, sand or gravel, or other material so as to render it valueless." The above is a quotation from *Hobbs v. Amador etc. Canal Co.*, 66 Cal. 161, 4 Pac. 1147, *Carson v. Hayes*, 39 Or. 97, 65 Pac. 814. Again, the author says: "While the miner is entitled to the free use of the channel for the purpose of carrying away his waste and tailings, he has no right to fill the channel with debris, causing the stream to overflow, and thus deposit the material on the lands of the lower proprietor. The miner is entitled to use his claim in a lawful manner, but no use can be considered lawful which precludes others from enjoying their rights," citing authorities. The author's discussion of this question, together with the authorities collected and cited, will be found quite interesting and useful.

Woodruff v. North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Saw. 441, is a well-considered case written by Judge Sawyer, and concurred in by Deady, J., Circuit Court, District of California. The leading cases bearing on the subject before us are discussed. We will only quote the nineteenth clause of the syllabus which is as follows: "In granting relief where the complainant's rights are certain, and the invasion of them is clearly established, a court of equity cannot consider the inconvenience which will result to defendants from the relief, nor is it the province of the court to speculate upon or to consider or to suggest any possible modes by which defendants may avoid the injurious consequences of their acts, or to decide upon the conflicting opinions of scientific experts concerning the possibility or sufficiency of such suggested modes. The only duty of the court is to grant the relief to which the complainant is entitled upon the law and facts of the case." The first article and section of our constitution provides as follows: "All men are, by nature, free and equal, and have certain inalienable rights, among which are enjoying and defending

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life and liberty; acquiring, possessing and protecting property, pursuing happiness, and securing safety." The right to the use of a stream for depositing debris from mines is discussed in section 840, volume 2, of Lindley on Mines. Many cases from the various states of the Union are cited and discussed by the author. He closes his text as follows: "No positive rule of law can be laid down to define and regulate such use with entire precision. As to this, all courts agree. It is a question of fact to be determined by the jury." This conclusion certainly seems reasonable and logical. If all counsel for respondent says in his demurrer, brief and oral argument is true, he should plead it in answer and submit the questions of fact to a jury. So says Mr. Lindley, and the decisions of nearly all of the states of the Union to which our attention has been called.

Mr. Cooley, in his valuable work on Torts, second edition, page 675, discusses the question of deposits upon land. We quote the following: "So it is a nuisance if a riparian proprietor shall cast into the stream earth, sand, and refuse of his business, or other things, which by the flowing water are carried and deposited upon the land of a proprietor below. The tort here consists in the act of committing the rubbish to the stream; the deposit upon the land below is only the consequence from which a cause of action in favor of a particular individual arises." A large number of American decisions are cited by the learned author in support of this text. A great many authorities have been cited by counsel for appellants as well as respondents that have not been discussed or referred to in this opinion. They have all been examined, and those only upon which respective counsel rely for a decision favorable to their contention have been quoted from and discussed.

Counsel for respondent insists that plaintiff's action is barred by the statute of limitations; that is not true, as shown by the pleadings; a continuing injury or damage such as is alleged to have existed in this case is not barred. The plaintiffs

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could have commenced their action when the damage first developed, or they may wait until their property is entirely destroyed and rendered valueless for any purpose, and then sue to recover the value of the property in damage. Counsel also insists that plaintiffs should not recover in this action by reason of their laches. *Carson v. Hayes*, 39 Or. 97, 65 Pac. 814-817, we think fully answers this contention. We quote from that opinion as follows: "It is said that plaintiffs made no objection to the expenditures of large sums of money by the defendants in opening up and developing their mines, in the construction of hydraulic works and reservoirs for the operation thereof. But the mere silence of the plaintiffs is not sufficient to stop them from now asserting their rights, because of such expenditures by the defendants. They were not acting under any license or agreement with the plaintiffs, but upon their own responsibility; and the plaintiffs had a right to assume that they did not intend by their operation of their mine to interfere with any of their rights."

The bar of the statute of limitations, as well as the laches of the plaintiffs, can be raised by an answer, and in that way all the facts brought before the court for determination.

The judgment is reversed, with instructions to overrule the demurrer and to require the defendants to answer within — days, respondents to pay all costs of this appeal, except one hundred and ten pages of the transcript, which must be paid by appellants, being no part of the record necessary to present the appeal.

Sullivan, J., concurs.

AILSHIE, J.—The nature of the argument employed in the majority opinion and the conclusion at which such a course of reasoning would inevitably arrive, led me to express briefly the grounds of my concurrence. While the burden of the complaint really seems to be that the waters of the stream have become poisoned from their use in the milling and concentrating processes employed by defendants, still I think there is

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sufficient stated in the complaint to constitute a cause of action for wrongfully dumping and depositing rock, earth, sand and waste material into the stream and filling up the natural channel of the stream, and thereby causing the same to wash over and upon the lands of the plaintiff. There seems to me to be a wide difference between the natural pollution or poisoning of waters which may necessarily and unavoidably result from the employment of the usual processes of reducing ores, and the dumping of rock, earth and debris into the channel of a stream and filling up and thereby causing it to overflow and flood the lands of others.

It should be remembered in this case that the plaintiff claims no right whatever to the use of any of the waters of the stream. The riparian doctrine, which prevails in most of the states, having been abrogated in this state, the plaintiff is in no position to insist that the waters of this stream should flow down to and through his lands in their natural condition and state. He may insist, however, that they shall not be diverted from their natural channel in such a manner as to be poured in floods over his lands.

There is no doubt in my mind but that the defendants were exercising a legal right guaranteed to them both by the constitution and statute when they were applying and using the waters of Canyon creek in milling and concentrating the ores taken from their mines. It is equally clear that any poisonous matter which may dissolve in and mingle with the water as a necessary and unavoidable result of the usual method of working and reducing such ores must be regarded in law as resulting from the exercise of a lawful right, for the effects of which no damage can be recovered. Lumber and grain may be transported to any point for manufacturing purposes; live-stock may be taken to any place for slaughter, but mines must be worked where mineral can be found, and it must follow from the very nature of the things and the requirements of the conditions that what would constitute either a nuisance or trespass in conducting and operating the one industry might be the exercise of a lawful right in operating the other. If A

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should erect and operate a soap factory on a lot alongside my residence, he would depreciate the utility, comfort and value of my property, and I would have my right of action because he could establish his business at a place where he would not injure me; but if he should bore and tap oil or natural gas on the same premises, he would thereby render my home valueless and uninhabitable, and still I should have no right of action against him, for the reason that he can neither remove his oil or gas well nor find it elsewhere. In *Barnard v. Shirley*, 135 Ind. 555, 41 Am. St. Rep. 460, 34 N. E. 605, 35 N. E. 117, the supreme court of Indiana, in discussing this principle of law, said: "Mines and mineral springs, natural gas and oil wells, cannot be removed. They must be operated where they are, or totally abandoned. Where, therefore, a work is lawful in itself, and cannot be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected, and any injury that may result notwithstanding such care in the management of the work must be borne without compensation. It is then a case in which the interests and convenience of the individual must give way to the general good." For authorities in line with this view, see *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, 6 Atl. 453; *Gibson v. Puchta*, 33 Cal. 310; *West Cumberland Iron Co. v. Kenyon*, [1879] 11 Ch. Div. 782, 48 L. J. Ch. 793; 3 Elliott on Evidence, sec. 1971.

The framers of our constitution, when adopting section 3, article 15, were mindful of the fact that in some sections of this state agriculture would predominate, and that the use of the waters for such purpose must have a preference right, while in other sections, as in the Coeur d'Alenes, mining would be the principal industry, and they accordingly ordained that a preference right to the use of the water should follow the prevailing industry. It must be conceded that the members of the constitutional convention understood the meaning of

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the word "milling," and the manner and method of using water for such purpose when they embodied that term in the organic law of the state. It would follow that in an agricultural section a miner would not be permitted to use the waters of an irrigation stream in milling and concentrating ores if the result would be to poison or pollute the water so as to injure growing crops on irrigated lands below.

As previously indicated, I do not conceive it necessary to the successful operation of a milling and concentrating plant that thousands of tons of rock, earth and debris should be dumped into the stream from which water is taken. But if it should be shown that no other dumping ground could be had, then it would seem clear that diligence and care should be exercised in impounding such debris.

(April 14, 1906.)

STATE, Appellant, v. ERNEST DRISKELL, Respondent.

[85 Pac. 499.]

NEW TRIAL, CRIMINAL CASE—MOTION FOR, SUSTAINED IN TRIAL COURT.

1. Where respondent was convicted of the statutory crime of rape, and it is shown that the evidence was conflicting on material questions involved in the trial, and the trial judge sustains a motion for a new trial without stating whether his order was based upon the insufficiency of the evidence or errors of law occurring at the trial, this court will not reverse such order unless error is manifest from the record.

(Syllabus by the court.)

APPEAL from the District Court of the Second Judicial District for Latah County. Hon. E. C. Steele, Judge.

Defendant was prosecuted for the crime of statutory rape, was convicted, and, after sentence, was granted a new trial. State appeals. *Order granting new trial affirmed.*

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Wm. E. Stillinger, Prosecuting Attorney of Latah County, and J. J. Guheen, Attorney General, for Appellant.

Wm. M. Morgan, and Albert L. Morgan, Attorneys for Respondent.

Counsel cite no authorities on point decided.

STOCKSLAGER, C. J.—The prosecuting attorney of Latah county filed an information against respondent charging him with the crime of statutory rape on the person of one Grace Clark. A trial was had and a verdict returned by the jury, finding him guilty as charged in the information. Within the time agreed upon by the prosecuting attorney and counsel for respondent, a bill of exceptions was settled and allowed by the court, and thereafter a motion in arrest of judgment was filed, to wit: "Comes now the above-named defendant, and moves the court to arrest the judgment in the above-entitled cause, and that no judgment be pronounced against the defendant on the verdict hereinbefore rendered, for the reason that the information in said cause does not state facts sufficient to constitute a crime against the laws of the state of Idaho." This motion was filed on the twenty-second day of January, 1906, overruled by the court, and defendant sentenced to five years' imprisonment in the state penitentiary; on the same day counsel for respondent there moved for a new trial on the following alleged errors: "1. That the court misdirected the jury in matters of law arising during the course of the trial. 2. That the verdict is contrary to both the law and the evidence."

On the twenty-ninth day of January, 1906, the court made the following order: "This cause coming on to be heard before me this twenty-ninth day of January, 1906, the defendant having heretofore, in open court, regularly made his application and motion for a new trial, within the time heretofore allowed by the court for that purpose; the time for the presentation of that motion and application being agreed to by

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the respective counsel for the state and the defendant, and the court having heard the arguments of the respective counsel for and against said application and motion, and having examined all the records and papers appertaining, and being fully advised in the premises both as to the law and the facts, it is hereby ordered that the said application and motion of the defendant for a new trial be, and the same is hereby granted and allowed." It is from this order that the state appeals.

We are not informed by the order of the learned trial judge on which ground or whether on both set out in respondent's motion he granted the new trial. It is conceded by the attorney general, also the county attorney of Latah county, who took the appeal and made the only oral argument in the case, that orders granting new trials are largely within the discretion of the trial court. The rule is so well settled that it needs neither discussion nor citation of authorities. It is apparent from the record that in the opinion of the court the information was sufficient to charge the crime of rape, as a demurrer alleging various reasons why it was insufficient had been overruled by the court. It would hardly seem reasonable that the motion was sustained on account of the insufficiency of the evidence to support the verdict, as this question had been passed upon by the jury; hence we conclude that the court was convinced that an error prejudicial to the rights of the defendant in the instructions given to the jury or refusal to give the requests of counsel for defendant, the admission of evidence on behalf of the prosecution or rejection of evidence offered by defendant, or some one or more of these reasons, prompted the court in granting a new trial. If it was apparent to the judge before whom this case was tried, after an examination of the record and proceedings of the trial, that some error had been committed that may have misled the jury in the conclusion reached that the defendant was guilty, then it was the duty of the court below to make the order granting respondent another hearing. It matters not so far as this court is concerned from the record before us, whether the order was based on the insufficiency of the evi-

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dence to support the verdict, or whether, in the opinion of the court, errors in the admission of evidence offered by the state or rejection of evidence offered by respondent prompted the court in making the order. He says he made it after familiarizing himself with both the law and the facts, and, as has been so often said by this court, where there are disputed facts the trial court and jury are in better position to pass upon them than this court. Without discussing what the record shows as to the facts in the case, it is sufficient to say that there are many contradictions shown, especially as to the confession of the respondent, and the facts and circumstances that led up to such confession.

In volume 1 of Greenleaf on Evidence, section 219, fifteenth edition, discussing confessions, and when they may be used against the accused, the author says: "Before any confession can be received in evidence in a criminal case, it must be shown that it was voluntary. The course of practice is to inquire of the witness whether the prisoner had been told that it would be better for him to confess, or worse for him if he did not confess, or whether language to that effect had been addressed to him." This rule stands uncontradicted by any author or text-writer, and, from the record in this case, we find much evidence and many contradictory statements as to just what was said by Mr. Clark, the father of Grace Clark, and respondent, prior to the meeting in the office of the prosecuting attorney, as well as in the office of such officer. If the theory of the prosecution is correct as to what was said in consultation between Mr. Clark and respondent, then the court erred in granting a new trial; if, on the other hand, the evidence offered by respondent, some of which was admitted and some rejected, shall be accepted as true and should have gone to the jury for their consideration, then there was no error in the order granting a new trial. As heretofore stated, the lower court was more familiar with the record and facts in this case than it is possible to bring here on paper, and we do not feel inclined to disturb his order granting a new trial. The order granting a new trial is sustained.

Sullivan, J., concurs.

Opinion of the Court—Ailshie, J., Concurring.

AILSHIE, J., Concurring.—I have examined the record in this case very minutely and in detail, and have been unable to find any reason why the trial court granted a new trial. It is clear to my mind that the evidence of extrajudicial statements made by the defendant was admissible, and that those statements were made under such circumstances as to clearly justify their admission. I am also satisfied that the court did not err in refusing to give the instructions requested by the defendant. The court had already given an instruction to the jury covering the same subject in even a more favorable light to the defendant than this request; and, indeed, one of which he could in no way complain. It is also true that there would have been no error in giving this requested instruction. It is as follows: "The guilt of the defendant cannot be proven alone by the confessions or statements of the defendant, without other evidence or circumstances tending to show the commission of the crime, and unless there is other evidence it is your duty to acquit the prisoner."

I have been unable to find any error committed by the court on the admission or rejection of evidence. The letters written by defendant's sister to him while in jail and after the commission of the alleged offense were clearly inadmissible, and the court properly rejected them. This leaves only one other possible ground upon which the court could have granted a new trial, and that is insufficiency of evidence. It is true there is a conflict in the evidence, and it was perhaps not an abuse of the discretion vested in the trial court in such cases to grant a new trial if he believed that material evidence introduced on the part of the state was false or that an injustice had been done the defendant by reason of false statements made by witnesses or misapprehension of facts by the jury.

Since the trial court has assigned no specific reason why he granted a new trial, it is as fair to presume that he granted it for this latter reason as for any other. On that ground alone, I concur in an affirmance of the order granting a new trial.

Points Decided.

(April 14, 1906.)

In re CHARLES H. MOYER.

[85 Pac. 190.]

HABEAS CORPUS—INTERSTATE EXTRADITION—ILLEGAL RENDITION—HOW AND WHEN CAN BE QUESTIONED—MANNER OF ARREST—MOTIVES FOR ISSUANCE OF EXECUTIVE WARRANT—FUGITIVE FROM JUSTICE—JURISDICTIONAL QUESTION—DETERMINATION QUASI JUDICIAL—WHEN CEASES TO BE FEDERAL QUESTION.

1. Where the accused is personally within the jurisdiction of the demanding state and there applies to the court for his discharge on *habeas corpus*, he cannot raise the question as to whether or not he has been, as a matter of fact, a refugee from the justice of that state within the meaning of the federal constitution and the act of Congress authorizing interstate extradition.

2. The action and conduct of the chief executive of the state in which the accused was found in issuing the executive warrant and of the executive and ministerial officers acting in aid of his warrant, is a matter for the consideration of the courts of his state, subject to the reviewing authority of the federal courts in so far as the federal question is involved, and is not a question open to examination or consideration by the courts of a foreign state.

3. The warrant of the chief executive of the state surrendering an accused person, whether issued lawfully or unlawfully, has accomplished its purpose and become *functus officio* as soon as the accused is delivered into the jurisdiction of the demanding state, and the regularity of its issuance thereupon ceases to be a question for judicial inquiry on application by the prisoner for his discharge, where he is at the time held under due and legal process issued out of a court of competent criminal jurisdiction of the demanding state.

4. The motives which prompt the chief executive of a state to issue his warrant for the rendition of a prisoner are not proper subjects of judicial inquiry. Such inquiry would be opposed to public policy and the freedom of action of the executive department of government.

5. The fact that a wrong has been committed against a prisoner in the manner or method pursued in subjecting his person to the jurisdiction of a state, against the laws of which he is charged with having transgressed, can constitute no legal or just reason why he should not answer the charge against him, when brought

Argument for Petitioner.

before the proper tribunal. The commission of an offense in his arrest does not expiate the offense with which he is charged.

6. The jurisdiction of a court in which an indictment is found or an accusation is lodged is not impaired by the manner in which the accused is brought before the court.

7. In interstate extradition the prisoner is only held under the extradition process until such time as he reaches the jurisdiction of the demanding state, and is thenceforth held under the process issued out of the courts of that state, and it necessarily follows that there is no longer a federal question involved in his detention.

8. Return of the officer and answer of the prisoner examined and considered in this case, and, *held*, that the prisoner is being detained under process duly and regularly issued by a court of competent criminal jurisdiction, and that he is not entitled to a discharge on *habeas corpus*.

(Syllabus by the court.)

APPLICATION of Charles H. Moyer, for a writ of *habeas corpus*. Writ issued and case heard and considered on the return and supplemental return of the officer and the answer of the prisoner, after which *writ is quashed* and the prisoner remanded to the custody of the officer.

Fred Miller, John F. Nugent and Edmund F. Richardson, for Petitioner.

If the accused was only constructively in the state committing a crime against it, although not personally within its borders, he has not fled from it and is not a fugitive from justice. (19 Ency. of Law & Pr. 87.)

A citizen of one state, charged in a requisition with the constructive commission of crime in another state, from which in fact he had never fled, is not a fugitive from justice, and the determination of the governor as to the sufficiency of the facts alleged is not conclusive. (*Jones v. Leonard*, 50 Iowa, 106, 32 Am. Rep. 116; *Wilcox v. Nolze*, 34 Ohio St. 520.)

In the case of *In re Mohr*, 73 Ala. 503, 49 Am. Rep. 63, a person was arrested as a fugitive from justice on a warrant issued by the governor of Alabama, in pursuance of a request by the governor of Pennsylvania, based on an indictment

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found in that state, charging false pretenses. It was held that he might show, on *habeas corpus*, that he was not in the state of Pennsylvania at the time the offense is alleged to have been committed, and that he has never been there since.

In the case of *State of Tennessee v. Jackson*, the United States district court decided (36 Fed. 259, 1 L. R. A. 370) that the person charged must be a fugitive from the state in which the crime was committed before the executive authority can be called into action, and where he is delivered up to the authorities of that state on a request based on a false affidavit that he is a fugitive, he will be released on *habeas corpus*.

The warrant of the executive is not conclusive of the fact of flight. The courts, upon *habeas corpus*, may inquire and determine the fact; it is at most but *prima facie* evidence. (*In re Cook*, 49 Fed. 833; *State v. Hall*, 115 N. C. 811, 44 Am. St. Rep. 501, 20 S. E. 729, 28 L. R. A. 289, and citations in notes; *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706, 64 N. E. 825, 60 L. R. A. 774; and *Hyatt v. New York*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456.)

When it is conceded, or when it is so conclusively proved, that no question can be made that the person was not within the demanding state when the crime is said to have been committed, and his arrest is sought on the ground only of constructive presence at that time in the demanding state, then the court will discharge the defendant. (*Munsey v. Clough*, 196 U. S. 364, 49 L. ed. 515, 25 Sup. Ct. Rep. 282.)

J. J. Guheen, Attorney General, Owen M. Van Duyn, Prosecuting Attorney of Canyon County, and J. H. Hawley, W. E. Borah and W. A. Stone, for the State.

This is not a matter which can be considered on *habeas corpus*, for the reason that the illegality of the arrest in the place from which the parties were taken, or defects in the warrant or other proceedings on which the extradition proceedings were based, cannot entitle such parties to the benefit of the writ; the authorities go so far as to hold that even if the party was kidnapped and brought into a state for trial, that fact is not of

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itself sufficient to authorize such party's release, except under demand made by the governor of the foreign state. (*Ex parte Barker*, 87 Ala. 4, 13 Am. St. Rep. 17, 6 South. 7; *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204; *State v. Smith*, 1 Bail. (S. C.) 283, 19 Am. Dec. 679; *State v. Ross*, 21 Iowa, 467; *Dows' Case*, 18 Pa. St. 37; 12 Am. & Eng. Ency. of Law, 607; Church on Habeas Corpus, sec. 462; 19 Cyc. of Pl. & Pr. 99.)

The warrant and papers in this state are in proper form. The duty of the executive of Colorado with reference to them was simply ministerial, and there is no law either in that state or in this, or any law of the United States, that makes it the duty of the arresting officer after the warrant from the foreign state has been issued by its executive, to remain any certain length of time in such foreign state in order that proceedings may be instituted therein by the arrested parties. (*In re Sultan*, 115 N. C. 57, 44 Am. St. Rep. 433, 20 S. E. 375, 28 L. R. A. 294. Also, see notes to *In re Fetter*, 57 Am. Dec. 389.)

AILSHIE, J.—The prisoner, Charles H. Moyer, applied to this court, through his counsel, for a writ of *habeas corpus*, requiring E. L. Whitney, warden of the state penitentiary, to produce the body of the prisoner at a time and place to be designated by the court, and to make true return of the cause or causes of his detention. A writ was thereupon issued, and the warden, at the time designated, produced the body of the prisoner in court, and made return that he was detaining him under order of the probate judge of Canyon county, and for that purpose as the agent of the sheriff of Canyon county. The return contains a certified copy of the order made by the probate judge, wherein it recites that the Canyon county jail is an unfit place for the detention of the prisoner, and orders and directs that he be temporarily detained in the state penitentiary at Boise City. The return further shows that on the twelfth day of February, 1906, a complaint, duly verified, by Owen M. Van Duyn, prosecuting attorney in and for Can-

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yon county, was filed with M. I. Church, probate judge of that county, charging the prisoner, Charles H. Moyer, with the crime of murder committed at Caldwell, Canyon county, on the thirtieth day of December, 1905. The return also shows that on the same date a warrant of arrest was duly issued out of the probate court of Canyon county for the apprehension and detention of the accused. The return indorsed on the warrant and made by the sheriff of Canyon county shows that the prisoner was, on the twenty-first day of February, 1906, arrested and taken before the court. It is further shown that at the time of making the return the grand jury of Canyon county was in session, and that the prisoner was held subject to the order of the district court in and for Canyon county, and that he had been from time to time, by order of the court, taken into court to be present at the impaneling of the grand jury. Before the final hearing on the return to this writ, the warden made a supplemental return to the effect that on the seventh day of March, 1906, the grand jury in and for Canyon county found a true bill of indictment against the prisoner, charging him with the commission of the crime of murder, at Caldwell, in Canyon county, on the thirtieth day of December, 1905, and that the indictment was thereupon duly filed in court, and that thereupon a bench warrant issued for the arrest of the accused Charles H. Moyer, and that the same was served, and the prisoner was thereafter, on the ninth day of March, arraigned before the court, and the time for pleading to the indictment was fixed for March 16th; and that the prisoner was thereafter, by the sheriff of Canyon county, returned to the state penitentiary and temporarily placed in charge of the warden thereof for detention, and is now held under such authority. The petitioner answered the return and supplemental return made by the warden, admitting all the material and essential facts contained in the return; he also pleaded further, separate and independent matter, for the purpose of showing that his imprisonment and detention was illegal and unlawful. While quite voluminous, the substance of this additional and independent matter con-

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tained in the answer is, that the petitioner is a citizen of the United States and of the state of Colorado, residing in the city and county of Denver, and that he has never been within the state of Idaho at any time since the twenty-eighth day of October, 1905, and that he was not in the state of Idaho on the thirtieth day of December, 1905, and was not a fugitive from the justice of the state of Idaho within the meaning of the federal constitution and the act of Congress providing for interstate extradition, and that he was wrongfully and unlawfully removed from the state of Colorado to the state of Idaho in pursuance of an unlawful combination and conspiracy entered into between the governors of the states of Idaho and Colorado, and the prosecuting attorney of Canyon county; that the governor of Colorado wrongfully and unlawfully honored the requisition of the governor of Idaho, and wrongfully issued his warrant and order for the arrest of the prisoner by the authorities of the state of Colorado, and that the prisoner was neither given time nor opportunity to apply to either the state or federal courts for his discharge prior to his delivery to the authorities within the jurisdiction of the state of Idaho. Counsel for the state moved to strike from the answer of the petitioner all matters leading up to and involving the extradition of the petitioner on the ground that the same is sham and irrelevant matter. After hearing exhaustive argument, this motion was sustained, and it was announced from the bench at the time that a written opinion would thereafter be filed setting forth the views of the court on the questions presented.

It is proper to first observe that the extradition proceedings and process by and under which the prisoner was brought into this state appear in all respects regular and in due form.

With the foregoing statement of the case, we will pass at once to a consideration of the questions of law involved.

We are of the opinion that after the prisoner is within the jurisdiction of the demanding state, and is there applying to its courts for relief, he cannot raise the question as to whether or not he has been, as a matter of fact, a fugitive from the justice of the state within the meaning of the federal constitu-

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tion, and the act of Congress. A careful and diligent examination of the many authorities touching upon this subject, and the reasons that exist for invoking the aid of the writ in such cases, convince us that the question as to whether or not a citizen is a fugitive from justice is one that can only be available to him so long as he is beyond the jurisdiction of the state against whose laws he is alleged to have transgressed. It is a remedy which does not go to the merits of the case, and does not involve the inquiry as to whether or not he is in fact guilty or innocent of the offense charged. It is a remedy that merely goes to the question of his removal from the jurisdiction in which he is found to the jurisdiction against the laws of which he is charged with offending. If these views be correct, and we believe they are, it follows that so soon as the prisoner is within the jurisdiction of the demanding state, both the reason and object for invoking this principle of law have ceased and can no longer have any application. It has been held that it ceases to be a federal question so soon as the prisoner invokes its aid within the state from which he is alleged to have fled. (*In re Cook*, 49 Fed. 841.) It must also necessarily follow that the courts of the state demanding the prisoner have no jurisdiction to inquire into the acts of the executive of the state delivering the prisoner. The action and conduct of the chief executive of the state in which the prisoner was found, and all of the executive and ministerial officers acting in aid of his warrant is a matter for the consideration of the courts of his state, subject to the reviewing authority of the federal courts in so far as the federal question is involved. The warrant of the chief executive of the state surrendering the prisoner, whether issued lawfully or unlawfully, has accomplished its purpose and becomes *functus officio*, so soon as the prisoner is delivered into the jurisdiction of the demanding state, and its validity and the regularity of its issuance thereupon cease to be questions open to the consideration of the courts of the demanding state.

- ✓ The prisoner was regularly charged with the commission of a crime in Idaho, and against her laws. The governor of Colorado honored the requisition from the governor of Idaho, and

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thereupon duly and regularly issued his warrant for the arrest and surrender of the accused to the agent of the state of Idaho. (This action of the Colorado governor was at least *quasi judicial* (*In re Cook*, 49 Fed. 841); it amounts to a determination that the accused was substantially charged with the commission of a crime and was a fugitive from justice. (*Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40.) (The motives which prompted the governor of a state to take such action or make such determination are not proper subjects of judicial inquiry. Such inquiry would be opposed both to the plainest principles of public policy and the freedom of action by the executive within the constitutional authority of that department of government.) Jurisdiction to take the action complained of is the test, and the jurisdictional facts are subject to review by the federal courts and courts of the surrendering state where they are applied to before the state whose laws it is charged have been violated acquires jurisdiction of the person of the accused. In the latter case the object has been accomplished, and as has been held in several cases, there is no process or authority for returning the prisoner to the state in which he was found. (*Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204; approved in *Cook v. Hart*, 146 U. S. 183, 36 L. ed. 939, 13 Sup. Ct. Rep. 40; *In re Moore*, 75 Fed. 834.) ✓

One who commits a crime against the laws of a state, whether committed by him while in person on its soil or absent in a foreign jurisdiction, and acting through some other agency or medium, has no vested right of asylum in a sister state (*Mahon v. Justice*, *supra*; *Lascelles v. Georgia*, 148 U. S. 543, 37 L. ed. 551, 13 Sup. Ct. Rep. 687; *Ker v. Illinois*, 119 U. S. 436, 30 L. ed. 421, 17 Sup. Ct. Rep. 225; *In re Moore*, 75 Fed. 824), and the fact that a wrong is committed against him in the manner or method pursued in subjecting his person to the jurisdiction of the complaining state, and that such wrong is redressible either in the civil or criminal courts, can constitute no legal or just reason why he himself should not an-

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swer the charge against him when brought before the proper tribunal. The prisoner does not represent in his person the sovereignty of either the demanding or surrendering state and is in no position to speak for either; on the other hand, if any offense was committed in course of his rendition, it was clearly an offense against the laws of one or both of those states; but neither state is here complaining. (*People v. Pratt*, 78 Cal. 349, 20 Pac. 733.)

No case has been called to our attention, and, in fact, we have been unable to find any instance where the prisoner has alleged as a ground for his discharge a like state of facts to those set up in the answer in this case, and to which the motion is here directed. We have, however, examined several authorities in which the same course of reasoning adopted by the courts, in holding that the prisoner should not be discharged, is equally, and as logically, applicable to the facts of this case.

Professor Peabody, sometime lecturer on Criminal Law, before the Harvard Law School, in his text on Interstate Extradition, at page 99, 19 Cyclopaedia, states the general principle touching the rights of prisoners illegally brought into a jurisdiction as follows: "It is not a cause for exemption from prosecution for a crime that the accused was illegally arrested in another state and unlawfully brought within the jurisdiction of the state against which he offended; he is not protected from prosecution even if he is kidnaped in the other state and brought into the state without a semblance of right. It follows, therefore, that he is not wronged by being subjected to its jurisdiction, although the requisition proceedings were not strictly legal. As the state to which a person has been illegally brought may hold him to answer for his offenses against it, it may arrest and surrender him on extradition proceedings to answer for his offenses against another state. The state from which he was wrongfully taken has no redress except to demand the extradition of the abductors that they in turn may be prosecuted by it."

In *Mahon v. Justice*, *supra*, a case in which a controversy arose between the states of West Virginia and Kentucky, over

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the kidnaping of the prisoner Mahon from the state of West Virginia, Justice Field, after stating the nature of the controversy, said: "The only question, therefore, presented for our determination, is whether a prisoner indicted for a felony in one state, forcibly abducted in another state and brought to the state where he was indicted, by parties acting without warrant or authority of law, is entitled under the constitution or laws of the United States, to release from detention under the indictment by reason of such forcible and unlawful abduction." In passing upon the question thus stated, that distinguished jurist said: "As to the removal from the state of the fugitive from justice in a way other than that which is provided by the second section of the fourth article of the constitution, which declares that 'a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime,' and the laws passed by Congress to carry the same into effect—it is not perceived how that fact can affect his detention upon a warrant for the commission of a crime within the state to which he is carried. The jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused is brought before it. There are many adjudications to this purport cited by counsel on the argument, to some of which we will refer." The opinion closes as follows: "So in this case we will say that, whatever effect may be given by the state court to the illegal mode by which the defendant was brought from another state, no right secured under the constitution or laws of the United States was violated by his arrest in Kentucky and imprisonment there, upon the indictment found against him for murder in that state."

In *Re Cook*, *supra*, the United States circuit court had under consideration the validity of an extradition granted by the governor where the party in fact had not been in the demanding state at the time the offense was committed, and the court, speaking of the validity of the executive warrant, said: "His warrant, unassailed by competent authority, is complete

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justification for the arrest and surrender of the alleged fugitive. When so delivered, by virtue of such warrant, his surrender is lawful, and the demanding state obtains rightful possession of his person, and may lawfully subject him to its criminal process for the offense charged. The executive warrant has then spent its force. It is no longer operative. The alleged offender is no longer subjected to deprivation of liberty by virtue thereof, but is rightfully held under the process of the state. When that has happened, no federal question remains. . . . The fact of flight may be in a sense jurisdictional to removal, as one says a criminal court has jurisdiction only of crime. But such court has jurisdiction to determine whether a certain act charged to have been committed is or is not a crime. Its decision therein, although erroneous, is not void. So here, the jurisdiction to determine the fact of flight is lodged with the executive. He has jurisdiction of the subject matter. His warrant is valid until his determination of the fact of flight is properly reversed. When, therefore, such valid warrant has been executed, the surrender thereunder is lawful, and the party lawfully subjected to the state jurisdiction." The later case was appealed to the supreme court, and in *Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40, the lower court was affirmed, and Justice Brown, who wrote the opinion on appeal, made the following observations: "It is proper to observe in this connection that, assuming the question of flight to be jurisdictional, if that question be raised before the executive or the courts of the surrendering state, it is presented in a very different aspect after the accused has been delivered over to the agent of the demanding state, and has actually entered the territory of that state, and is held under the process of its courts." In *Ex parte Johnson*, 167 U. S. 120, 42 L. ed. 103, 17 Sup. Ct. Rep. 735, the court made the distinction between the service of civil process and that of criminal process, where the party had been wrongfully brought into the jurisdiction, and said: "Indeed, there are many authorities which go to the extent of holding that in criminal cases a forcible abduction is no sufficient reason why the party should not answer when brought within

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the jurisdiction of the court which has the right to try him for such an offense and presents no valid objection to his trial in such court. . . . The law will not permit a person to be kidnaped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest." To the same effect, see *Dow's Case*, 18 Pa. St. 37; *Ex parte Ker*, 18 Fed. 167; *State v. Smith*, 1 Bail. (S. C.) 283, 19 Am. Dec. 697; 12 Am. & Eng. Ency. of Law, 607; *Eaton v. West Virginia*, 91 Fed. 760, 34 C. C. A. 68; *Kingen v. Kelley*, 3 Wyo. 571, 28 Pac. 38, 15 L. R. A. 177; *Ex parte Barker*, 87 Ala. 4, 13 Am. St. Rep. 17, 6 South. 7; *State v. Ross*, 21 Iowa, 467; *State v. Patterson*, 116 Mo. 505, 22 South. 696; *Bookin v. State*, 26 Tex. App. 121, 9 S. W. 737; *State v. Glover*, 112 N. C. 896, 17 S. E. 925.

Counsel for petitioner lay much stress on the proposition that neither an individual nor the state can be allowed to gain an advantage by means of an unlawful or wrongful act. That proposition is true, but to gain an advantage means to obtain a superiority of position or opportunity which would not appear to have been done in such a case as this, admitting all the facts charged to be true. Where the state accuses a person of the commission of an offense against its laws, the mere apprehension of the accused, although in an unlawful manner, and subjecting him to the jurisdiction of the courts to answer the charge cannot amount to a legal advantage any more than if the accused had voluntarily surrendered himself to the authorities. The wrongful or unlawful means employed in making an arrest, however criminal they might be, could not be chargeable to the sovereignty, which can commit no crime, but would be the crime of the individual who committed the act and would furnish no reason or justification for discharging the prisoner when brought before the court. If, therefore, a crime should be committed by any person in abducting, apprehending or arresting the accused, such person may be held to answer in the proper jurisdiction for the commission of the

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offense. But the commission of the latter offense does not expiate the former.

Numerous authorities are cited on behalf of petitioner to the effect that a lawful rendition cannot be had of one who was not in fact within the demanding state when the offense is charged to have been committed. The latest and highest authority that has been brought to our attention on this phase of the case is *Hyatt v. New York*, 188 U. S. 691, 47 L. ed. 657, 33 Sup. Ct. Rep. 456; S. C., 172 N. Y. 176, 92 Am. St. Rep. 706, 64 N. E. 825, 60 L. R. A. 774. As we have heretofore said, the question as to whether or not the prisoner was in fact a refugee from justice cannot arise at this time in the case at bar. Except for the construction placed on the second clause of section 2 of the fourth article of the constitution of the United States, and section 5278 of the United States Revised Statutes, by the highest court of the land, we should undoubtedly incline to the belief that they were designed and intended to authorize the extradition of any person who has offended against the laws of one state and is thereafter found in another state. It would seem that by the language: "Who shall flee from justice," is rather meant a flight from a punishment—a penalty or condition which would follow capture and conviction—than a flight from a *place* or the *territorial limits* of the outraged commonwealth. The pursuing hand of justice demanding vindication and vengeance is a much stronger inducement to flight than the mere discomforts of place or the horrors or dislike of state lines. While the belief just expressed is the unanimous view of this court as to the real purpose and intent of the extradition clause of the federal constitution, it amounts to the merest observation in this case and in no respect influences its decision. We are not unmindful of the fact that the almost uniform current of authority, both federal and state, is to the effect that the flight must be from a *place*, namely, from the *territorial limits* of the state demanding the prisoner. It is worthy of note, however, that under that line of authority, as was suggested on the argument of this case, an assassin on the Oregon bank of the great waterway that marks our western boundary might, by firing across

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the stream, murder numbers of our citizens, and be exempt from extradition, and go free from punishment. In this respect, the views expressed by Mr. Justice Clark in the extraordinary case of *State v. Hall*, 115 N. C. 811, 44 Am. St. Rep. 501, 20 S. E. 729, 28 L. R. A. 293, are worthy of consideration.

Counsel place considerable stress on *In re Robinson*, 29 Neb. 135, 26 Am. St. Rep. 378, 45 N. W. 267, 8 L. R. A. 398, a case where the supreme court of Nebraska ordered a prisoner discharged because he had been forcibly brought into the state without requisition process. That case does not meet the facts of the case at bar; besides, it seems to rest on the rule adopted in civil cases rather than that applied to criminal cases. The statement there made as to the current of authority on the question of interstate extradition leaves it open to the criticism that it is not a sound or carefully considered case. In fact, the weight of authority is entirely the other way, as will be seen from an examination of *Lascelles v. State*, 148 U. S. 537, 37 L. ed. 552, 13 Sup. Ct. Rep. 687; *Lascelles v. State*, 90 Ga. 347, 35 Am. St. Rep. 216, 220, 16 S. E. 945, 946. See 11 Rose's Notes on U. S. Rep., p. 239.

The motion having been sustained, the case remains here on the answer of the warden which is admitted to be true. The prisoner has been indicted on the charge of murder; and for the purposes of this case, whether as a principal or accessory, is immaterial under our statute (Rev. Stats., secs. 7679, 7698; *Territory v. Guthrie*, 2 Idaho, 432, 17 Pac. 39); as is also the question as to whether he was within or without the state at the time of the alleged commission of the offense. (Rev. Stats., secs. 6331, 7481.) The proceedings appear regular on the face of the returns, and in conformity with the laws of the state, and since the prisoner is being held under process duly and regularly issued by a court of competent criminal jurisdiction, we are commanded by statute to remand him to custody. The writ is quashed, and the prisoner is remanded to the custody of the officer.

Stockslager, C. J., and Sullivan, J., concur.

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(April 14, 1906.)

In re WILLIAM D. HAYWOOD.

[85 Pac. 902.]

APPLICATION of William D. Haywood for a writ of *habeas corpus*. Writ issued, and case heard and considered on the return and supplemental return of the officer and the answer of the petitioner. Writ *quashed*, and prisoner remanded to the custody of the officer.

Fred Miller, John F. Nugent and Edmund F. Richardson, for the Petitioner.

John J. Guheen, Attorney General, Owen M. Van Duyn, Prosecuting Attorney of Canyon County, and James H. Hawley, W. E. Borah and W. A. Stone, for the State.

Per CURIAM.—The facts in this case are substantially the same as *In re Moyer*, (*ante*, p. 250, 85 Pac. 190), just decided by this court, and upon the authority of that case, and for the reasons therein stated, the writ is quashed, and the prisoner remanded to the custody of the officer.

(April 14, 1906.)

In re GEORGE A. PETTIBONE.

[85 Pac. 902.]

APPLICATION of George A. Pettibone for a writ of *habeas corpus*. Writ issued, and cause heard and considered on the return and supplemental return of the officer and the answer of the petitioner. Writ *quashed*, and prisoner remanded to the custody of the officer.

Points Decided.

Fred Miller, John F. Nugent and Edmund F. Richardson, for the Petitioner.

John J. Guheen, Attorney General, Owen M. Van Duyn, Prosecuting Attorney of Canyon County, and James H. Hawley, W. E. Borah and W. A. Stone, for the State.

Per CURIAM.—The facts in this case are substantially the same as *In re Moyer*, (*ante*, p. 250, 85 Pac. 190), just decided by this court, and upon the authority of that case, and for the reasons therein stated, the writ is quashed, and the prisoner is hereby remanded to the custody of the officer.

(April 16, 1906.)

E. NOBLE, State Veterinary Surgeon, Petitioner and Plaintiff, v. ROBERT S. BRAGAW, State Auditor, Defendant.

[85 Pac. 903.]

CONSTITUTIONAL LAW—REPEAL, AMENDMENT AND REVISION OF LEGISLATIVE ACT—PUBLICATION OF SECTION AS AMENDED—STATE VETERINARY SURGEON—DUTIES OF—RULE OF STATUTORY CONSTRUCTION—ABOLISHMENT OF OFFICE—DUTIES IMPOSED ON OTHERS—EXPRESS AND IMPLIED REPEALS—AMENDATORY ACTS—ACT PART CONSTITUTIONAL AND PART UNCONSTITUTIONAL.

1. Before a legislative act is held unconstitutional, it should appear beyond a reasonable doubt that it infringes some provision of the constitution. Section 18 of article 3 of the state constitution prohibits the legislature from revising or amending any act by mere reference to its title and commands that the section as amended shall be set forth and published at full length.

2. Said section of the constitution does not require the whole act containing the section amended to be republished in full; it only requires republication of the section amended.

3. An act approved February 6, 1905 (Sess. Laws 1905, p. 39), is an act for the suppression of contagious and infectious diseases

Points Decided.

among livestock, and repeals certain provisions of an act entitled, "An act to suppress contagious and infectious diseases of sheep, etc.," approved March 7, 1901 (Sess. Laws 1901, p. 142), and continues in force certain provisions of said act relative to the authority and duties of the state sheep inspector and his deputies, and imposes those duties on the state veterinary surgeon and those under him.

4. Under the provisions of said section 18, article 3 of the constitution, a repeal may be made of a certain section or of an entire act without republishing the whole of the same, as said section of the constitution has no application to repeals, but only to revisions and amendments.

5. Section 39 of the act of 1905 provides, among other things, that its provisions should not be so construed as repealing any provision of the act of 1901 not inconsistent with or in conflict with the provisions of the act of 1905, and then declares that the remaining provisions of the act of 1901 and the act of 1905 should be construed together for the purpose of carrying out the objects sought by each, to wit, the eradication of contagious and infectious diseases among the livestock in the state. That is only an announcement of the legislative intent and correctly states the rule applicable to the construction of two acts or two laws bearing on the same subject.

6. The act of 1905 abolishes the office of state sheep inspector and his deputies, and in their place creates the office of state veterinary surgeon, assistants and livestock inspectors, and to that extent repeals the act of 1901. Said act of 1905 prescribes many of the duties of said last-mentioned officers, and in addition requires them to perform all of the duties required by the act of 1901 to be performed by the state sheep inspector and deputies not repealed by said act of 1905.

7. The abolishment of an appointive office by an act of the legislature and imposing the duties of such office on another officer without enumerating in detail such duties, in no manner violates the provisions of section 18, article 3 of the constitution.

8. Neither express nor implied repeals come within the constitutional inhibition contained in said section 18, article 3 of the constitution.

9. Two or more laws relating to the same subject, or different parts of the same subject, are not necessarily amendatory to each other within the meaning of the provisions of said section 18 of article 3 of the constitution, although they may be construed *in pari materia*.

(Syllabus by the court.)

Argument for Plaintiff.

APPLICATION for a writ of mandate to compel the state auditor to issue a state warrant in payment of the state ordinary surgeon's salary. *Writ granted.*

Richards & Haga, for Plaintiff.

Every possible presumption is to be indulged in favor of the validity of the statute. (*Fletcher v. Peck*, 6 Cranch, 128, 1 L. ed. 162; *Ogden v. Saunders*, 12 Wheat. 270, 6 L. ed. 606; *Alger v. Kansas City*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. 273.)

Section 3, article 18, of the Idaho constitution does not apply to acts that do not purport to amend or revise. It has no application to amendments by implication, or to repeals, whether express or by implication; it does not require all the acts on that particular subject to be republished in full; it only requires the republication of the *section* which it purports to amend, and if the amendment is caused by implication, no republication is necessary. (*Gilbert v. Moody*, 3 Idaho, 3, 25 L. 1092.)

The leading case on the construction of such constitutional provision as is now before the court is *People v. Mahaney*, 13 Cal. 496. See, also, *Evernham v. Hulit*, 45 N. J. L. 53; *Over Circle R. R. Co. v. Nester*, 10 Colo. 403, 15 Pac. 714; *People v. Wright*, 70 Ill. 388; *Long v. Sullivan*, 21 Colo. 109, 15 Pac. 359; *Warren v. Crosby*, 24 Or. 558, 34 Pac. 661; *Northern Counties Investment Co. v. Sears*, 30 Or. 388, 41 Pac. 135, 35 L. R. A. 188; *Hellman v. Shoulters*, 114 Cal. 136, 44 L. 915, 45 Pac. 1057; *Lake v. State*, 18 Fla. 501; *State v. N. W. Va.*, 8 W. Va. 720; *State v. Moore*, 48 Neb. 870, 67 N. W. 100; *County Commrs. of Dorchester Co. v. Meekins*, 50 Md. 28, 13 L. R. A. 188; *State v. Bennett* (Mo.), 11 S. W. 264; *State v. Scott*, 32 Ark. 279, 73 Pac. 365; *State v. Rogers*, 107 Ala. 444, 19 L. 909, 32 L. R. A. 520; *Arnoult v. New Orleans*, 11 La. 54; *State v. Miller*, 100 Mo. 439, 13 S. W. 677; *Johnson v. Martin*, 75 Tex. 33, 12 S. W. 321; 26 Am. & Eng. Ency. of Law, 2d ed., 711, 714; *State v. Jones*, 9 Idaho, 693, 75 L. 819; *School Directors v. School Directors*, 135 Ill. 464;

Argument for Defendant.

28 N. E. 49. Where one construction of ambiguous words in an amendatory act would render it obnoxious to this constitutional inhibition, and another construction would render it valid, the latter must be adopted. (26 Am. & Eng. Ency. of Law, 707; *Horkey v. Kendall*, 53 Neb. 522, 68 Am. St. Rep. 623, 73 N. W. 953; *State v. Frank*, 60 Neb. 327, 83 N. W. 74.)

An act will not be held unconstitutional merely because there may be persons to whom or cases in which it cannot in all respects constitutionally apply.

The objections urged by defendant as to its being impossible to determine what portions of the old act are left intact by reason of the reference thereto made in section 39 of the act of 1905 are not available as to him and as against plaintiff. (*Airy v. People*, 21 Colo. 144, 40 Pac. 362; *McKinney v. State*, 3 Wyo. 719, 30 Pac. 293, 295, 16 L. R. A. 710; *Newman v. People*, 23 Colo. 300, 47 Pac. 278; Cooley's Constitutional Limitations, 5th ed., 197; *Davidson v. Von Detten*, 139 Cal. 467, 73 Pac. 189.)

J. J. Guheen, Attorney General, and Edwin Snow, for Defendant.

The act of March 6, 1905, by the provisions of section 39, clearly and in terms amends the act of the legislature approved March 7, 1901 (Sess. Laws 1901, p. 142); and by reason of such amendment the entire act of March 6, 1905, becomes interwoven with the portions of the act of 1901 so amended, so that the whole act of March 6, 1905, is thereby rendered void. (*Warren v. Crosby*, 24 Or. 558, 34 Pac. 661.)

Sections of the constitution similar to the one involved in this case are common in the constitutions of most of the states. The books are full of cases in which similar attempts were made to evade these constitutional provisions. Some of these amended sections of the law by title; others ingrafted further provisions of the law upon sections which were referred to only by stating the substance of them; and still other cases simply set forth certain new provisions of the law, but which, in their very nature, had to be construed

Argument for Defendant (Amici Curiae).

in connection with existing legislation, or must otherwise have become entirely inoperative. (*Barnhill v. Teague*, 96 Ala. 207, 11 South. 444; *In re Buelow*, 98 Fed. 86; *Copland v. Pirie*, 26 Wash. 481, 90 Am. St. Rep. 769, 67 Pac. 227; *Stricklett v. State*, 31 Neb. 674, 48 N. W. 820; Cooley's Constitutional Limitations, 7th ed., p. 214; Sutherland on Statutory Construction, 2d ed., sec. 231, and cases there cited; 44 Century Digest, col. 2695, where a large number of cases are given; 26 Am. & Eng. Ency. of Law, 2d ed., p. 707; *Lehman v. McBride*, 15 Ohio St. 602; *Tuskaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *Miller v. Berry*, 101 Ala. 531, 14 South. 655; *Haring v. State*, 51 N. J. L. 386, 17 Atl. 1079; *State v. Beddo*, 22 Utah, 432, 63 Pac. 96 (followed in several subsequent cases); *Judson v. Bessemer*, 87 Ala. 240, 6 South. 267, 4 L. R. A. 742; *Beard v. Wilson*, 52 Ark. 290, 12 S. W. 567; *Dodd v. State*, 18 Ind. 56; *Haverly v. State*, 63 Neb. 83, 88 N. W. 171; *In re House Roll No. 284*, 31 Neb. 505, 48 N. W. 275; *French v. Woodward*, 58 Mo. 66; *Walker v. Caldwell*, 4 La. Ann. 297; *State v. Guiney*, 55 Kan. 532, 40 Pac. 926.)

Fremont Wood and Edgar Wilson, *amici curiae*.

We contend that section 39 of the act known as the state veterinary law clearly revised and is amendatory of the law creating the office of sheep inspector, prescribing his duties, etc., approved March 7, 1901, and that it therefore violates section 18 of article 3 of our state constitution.

It is absolutely impossible to read the act of 1905 and know what the law on the subject is without a judicial interpretation of every section of the act of 1901. To prevent this condition of affairs arising in legislation the above section of our constitution was adopted. (Citing, in addition to authorities cited by counsel for defendant, 23 Am. & Eng. Ency. of Law, 278, and following: *Evernham v. Hulit*, 45 N. J. L. 53; *State v. Parsons*, 40 N. J. L. 123; *Colwell v. Chamberlain*, 43 N. J. L. 388; *Campbell v. Board of Pharmacy*, 45 N. J. L. 241; *State v. McNeal* (*Christie v. Bayonne*), 48 N. J. L. 407,

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5 Atl. 805; *State v. Morrey*, 23 Utah, 273, 64 Pac. 764; *State v. Buker*, 23 Utah, 276, 64 Pac. 1118; *Denver Circle R. Co. v. Nester*, 10 Colo. 403, 15 Pac. 715; *Long v. Sullivan*, 21 Colo. 109, 40 Pac. 359.)

A simple inspection of the state veterinary law of 1905 clearly shows that it sought to amend specifically, and not by implication, the state sheep inspector law of 1901, and it attempted to do this without setting forth in full the law of 1901, or any section thereof as thus amended. If the legislature can do this in this instance, then it can do it in any instance, and section 18 of article 3 of our constitution would be an absolute nullity.

SULLIVAN, J.—This is an application for a writ of mandate to the auditor of the state to compel him to issue certain state warrants to the plaintiff on account of his salary as state veterinary surgeon, and for certain expenses connected with said office. The defendant answered the petition for the writ and put in issue the constitutionality of the act creating the office of veterinary surgeon, which was approved March 6, 1905, and is entitled, "An act to suppress contagious and infectious diseases among livestock; creating a livestock sanitary board and providing for its appointment; to create the office of state veterinary surgeon, providing for his appointment and fixing his compensation, providing for the appointment of assistant veterinary surgeons and livestock inspectors and fixing their compensation; prescribing penalties for the failure to comply with the provisions of this act; creating a livestock sanitary fund and providing for the levying of a tax therefor." (Sess. Laws 1905, p. 39.) Said act was evidently passed pursuant to the provisions of section 1 of article 16 of our state constitution. This act belongs to that class of legislation known as police regulations and is under the head of police powers, which powers embrace the powers of the government to preserve and promote the public welfare, the safety, the health, good order and happiness of the people, and authorize the establishment

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such rules and regulations for the conduct of all persons, for the use and management of all property as may be conducive to the public interest and welfare of the people. The act contains forty sections and appears to be a very fully drawn act covering the entire subject contained in title, its main purpose being to eradicate infectious and contagious diseases from the livestock of the state. The principal contention arises over the provisions of section 39 of said act, which is as follows: "This act is intended to repeal those provisions of that certain act of the legislature entitled 'An act to suppress contagious and infectious diseases of sheep, to create the office of sheep inspector and deputy sheep inspectors; to provide for the appointment of the same and to fix their compensation; making the doing of certain acts a crime and providing for the punishment of the same; and for other purposes, and repealing an act entitled "An act to repress contagious and infectious diseases of sheep; to create the office of state sheep inspector and of deputy sheep inspectors, to provide for the appointment of the same and to fix their compensation; making the doing of certain acts a crime and providing for the appointment of the same and for other purposes," approved February 25, 1899,' which creates the office of sheep inspector and deputy sheep inspectors for the state of Idaho, but shall not be construed as repealing any other provision of said act not inconsistent with the provisions of this act, but these acts shall be construed together for the purpose of carrying out the objects sought by each of said acts, to wit, the suppression and eradication of contagious and infectious diseases among livestock in this state, and the state veterinary surgeon shall possess all the authority granted to the state sheep inspector under said act, and the assistant veterinary surgeons and inspectors to be appointed under this act shall possess all the powers of a deputy sheep inspector under the said act heretofore, in this section, referred to."

The act referred to by title in said section 39 above quoted is found on page 142, Session Laws of 1901, approved March

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7, 1901, and is entitled, "An act to suppress contagious and infectious diseases of sheep, to create the office of sheep inspector, and deputy state sheep inspectors, to provide for the appointment of the same and fix their compensation; making the doing of certain acts a crime and providing for the punishment of the same and for other purposes, and repealing an act entitled, 'An act to suppress contagious and infectious diseases of sheep; to create the office of state sheep inspector and of deputy sheep inspectors, to provide for the appointment of the same and fix their compensation; making the doing of certain acts a crime and providing for the punishment of the same and for other purposes,' approved February 25, 1899." That act applied to sheep only, while the act in question includes all livestock. It is contended by counsel for the defendant that said section 39 is amendatory of said act approved March 7, 1901, and for that reason it violates the provisions of section 18 of article 3 of our state constitution, which section is as follows: "No act shall be revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length."

The rule is well established in this country that a legislative act is presumed to be constitutional until it is shown beyond all reasonable doubt that it is not so, and that presumption has been followed since the days of the great Chief Justice Marshall, when he declared that the question whether a law be void from its repugnancy to the constitution is at all times a question of much delicacy which ought seldom, if ever, to be decided in the affirmative in a doubtful case. And he stated in *Fletcher v. Peck*, 6 Cranch, 128, 3 L. ed. 162, that "the opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other" before a court would hold a law unconstitutional. In *Ogden v. Saunders*, 12 Wheat. 270, 6 L. ed. 606, the supreme court of the United States said: "It is but a decent respect due the wisdom, the integrity and the patriotism of the legislative

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by which any law was passed, to presume in favor of validity until its violation of the constitution is proved and all reasonable doubt." In *Mugler v. Kansas*, 123 U. S. 273, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, the supreme court of the United States said: "Every possible presumption is indulged in favor of the validity of a statute." Then guided by that well-established rule, the question for decision is: Does said act conflict with said section 18 of article 3 of the Idaho state constitution? That section provides that no act shall be revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length. The limitation therein contained is not upon the power of the legislature to legislate, but is upon the manner in which amendments shall be made. That section applies to the revision or amendment of any act. Where the revision or amendment of a certain section of an act is made, it cannot be done by mere reference to its title, but the section as amended must be set forth and published at full length. That section of the constitution does not require the whole act containing the section amended to be republished in full; it only requires the republication of the section which it purports to amend. The evils intended to be prevented by the provisions of said section have so frequently been referred to by courts and text-writers that it is not necessary to quote from them

prior to the adoption of such a constitutional provision as is contained in said section 18, the practice was very common to amend an act or section thereof by merely stating that certain words should be inserted at a certain place or that certain words therein or certain words be stricken therefrom, and when several such amendments had been made, it naturally created great confusion in the law or the section so amended, and the provisions of said section of the constitution were intended for the purpose of preventing that evil and putting an end to that method of amendment.

With those observations we will proceed to examine the act now under consideration. Said act does not purport to amend

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any of the provisions of the law of 1901, or any other law except in minor or *pro forma* matters, which we will consider hereafter when we consider section 39 of said act. The latter act is complete in itself and contains forty sections. The first thirty-eight sections constitute a complete act. It creates the office of state veterinary surgeon, prescribes the qualifications of that officer, fixes his salary, defines his duties and his powers, and in great detail furnishes all the machinery required to carry those powers into effect, and the general appropriation act of 1905 makes an appropriation with which to pay the veterinary surgeon's salary. We find nothing in any of the sections of said act down to section 39 that in any manner conflicts with any provision of the constitution of the United States or the constitution of the state of Idaho. The question then arises, is there anything in the provisions of said section 39 that so contravenes the provisions of the constitution as to nullify the entire act as expressed in the first thirty-eight sections thereof? The legislative intent is clearly expressed in said section 39; that it was their purpose to repeal such parts of the act of 1901 as created the office of sheep inspector and deputy sheep inspectors of the state; that part of said section is not in conflict with the provisions of said section 18 of the constitution, for it expressly repeals such parts of the act of 1901 as create the office of sheep inspector and deputy sheep inspectors. A repeal may be made of a certain section or of an entire act without republishing the whole of the same. Said section of the constitution has no application to repeals, but only to revisions and amendments. Had the legislature stopped there, there could be no question as to the constitutionality of the act and it would have left the state with a veterinary surgeon, with the offices of sheep inspector and deputy sheep inspectors abolished, but said section proceeds further to declare that the act in question should not be construed as repealing any other provision of the act of 1901 not inconsistent or in conflict with the provisions of the act of 1905, and then declares that these acts should be construed together for the purpose

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carrying out the objects sought by each of said acts, to the suppression and eradication of contagious and infectious diseases among livestock in the state. This is only an announcement of the legislative intent, and is the announcement of a correct rule of law when applied to the construction of the two acts or two laws bearing on the same subject. It is not but the announcement of a rule of construction which this court always applies to statutes bearing upon the same subject. Statutes that pertain to the same subject matter should be construed together, unless they are in conflict, and in case they are, the latter or subsequent statute is deemed to repeal the former, and had section 39 ended at the point just suggested, we do not think the validity of the entire act would be questioned. In that case the office of state veterinary surgeon would have been established and the offices of state sheep inspector and deputy sheep inspectors would have been abolished by an express repeal of the provisions of the law creating them. But the legislature in said section 39 proceeded further, and declared that it was their intention that the veterinary surgeon should possess or be empowered with all of the authority granted to the state sheep inspector under the act of 1901, and therein lies the most difficult question in the case. By the latter provisions of that section the state veterinary surgeon is given the authority formerly possessed by the state sheep inspector. The powers and duties of the sheep inspector are prescribed in the act of 1901, and all of such powers and duties are not set forth and enumerated in the act under consideration. The question arises, then: Should the legislature have proceeded to set forth and enumerate the powers of state sheep inspectors that were conferred upon the state veterinary surgeon? It was not necessary for the legislature to do that, for, as I view it, the office of sheep inspector has been abolished by the act under consideration and all of the duties imposed upon him by the act of 1901, in connection with others, are imposed upon the veterinary surgeon by the act in question. The abolishment of one appointive office and imposing the duties thereof on another

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without enumerating such duties in detail in the act abolishing the office, does not impinge in any manner upon said provisions of the constitution.

In *Gilbert v. Moody*, 3 Idaho, 3, 25 Pac. 1092, which involved the constitutionality of an act substituting the word "state" for the word "territory" wherever it appeared in the Revised Statutes, and the word "auditor" for the word "comptroller," and imposing the duties of the comptroller on the auditor, such act was held not in conflict with said provisions of the constitution. The leading case on the construction of the provisions of a constitution similar to those under consideration here is that of *People v. Mahaney*, 13 Mich. 496. That decision was written by Judge Cooley, one of the most eminent authorities on constitutional law that this country has ever produced, and which decision is quoted with approval wherever the particular question here presented has been raised. Justice Cooley there said: "It is next objected that the law is invalid because in conflict with section 29 of article 4 of the constitution, which provides that 'no law shall be revised, altered or amended by reference to its title only; but the act revised and the section or sections of the act altered or amended, shall be re-enacted and republished at length.' The act before us does not assume, in terms, to revise, alter or amend any prior act, or section of any act, but by various transfers of duties it has an amendatory effect by implication, and by its last section it repeals all inconsistent acts. We are unable to see how this conflicts with the provision referred to. If, whenever a new statute is passed, it is necessary that all prior statutes modified by it by implication should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the state would require to be republished at every session, and parts of it several times over, until, from mere immensity of matter, it would be impossible to tell what the law was. If, because an act establishing a police government modifies the powers and duties of sheriffs, constables, water and sewer commissioners, marshals, mayors and justices, and imposed new duties upon the ex-

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executive and the citizen, it has thereby become necessary to re-enact and republish the various laws relating to them all as now modified, we shall find before the act is completed, that it not only embraces a large portion of the general laws of the state, but also that it has become obnoxious to the other provisions referred to, because embracing a large number of objects, only one of which can be covered by its title. This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purports only to insert certain words, or to substitute one phrase for another in an act or section, which was only referred to, but not published, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."

It is there said that the constitutional provision under consideration must receive a reasonable construction with a view to give it effect, and the mischief desired to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves are sometimes deceived in regard to their effect. There can be no doubt in regard to the effect of the act under consideration, and it simply imposes on the state veterinary surgeon all of the duties that were imposed by the act of 1901 on the state sheep inspector and his deputies. The first three sections of that act do not refer to the duties of the sheep inspector, and are repealed by the act of 1905. Beginning with section 4 of the act of 1901, to and including section 28 of said act, we find the authority and duties of the sheep inspector and his deputies prescribed therein. Said

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duties are imposed by the act in question on the state veterinary surgeon and his assistants. It leaves those duties clear and concise. They are not blind to anyone, nor would they deceive anyone in regard to their effect.

In *Evernham v. Hulit*, 45 N. J. L. 53, which is a case involving a provision of the New Jersey constitution somewhat broader than that of our own, the court said: "A construction of this constitutional provision which would sustain the contention of the plaintiff on *certiorari* would lead to the most embarrassing results. It would be equivalent to holding that the legislature can pass no act changing any part of the statute law in force in this state without re-enacting at length every section in the whole body of existing statutes that might be affected by the new legislation. Since the constitutional amendments went into effect, a considerable number of acts have been passed designed to simplify and make most efficacious the mode of making and collecting assessments for local improvements in the municipalities of this state. These were subjects specially provided for in sections contained in their several acts of incorporation. General acts have always been passed providing for the assessment, collection and lien of taxes—subjects specially provided for in sections incorporating cities, towns and townships, as well as in several parts of the general tax law of this state. In many instances, provisions of this kind are contained in long sections, in which it is usual to express and define the general powers of corporations. Sometimes they are distributed in appropriate places in different sections of the acts. If this constitutional provision has made it necessary to the validity of a new statute on the subject that every prior statute on the same subject which may be altered or modified should be inserted in it at length, it would be quite impossible to legislate at all on the subject mentioned, or on kindred subjects; for a statute which would comply with such a requirement would probably be obnoxious to that other provision of the constitution, that every law should embrace but one object, and that object should be embraced in its title."

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See, also, *Denver C. R. R. Co. v. Nester*, 10 Colo. 403, 15 Pac. 714; *State v. Scott*, 32 Wash. 279, 73 Pac. 365. The act of 1905 does not amend, unless it be by implication, any of the provisions of the law of 1901. It does, however, repeal certain provisions of the latter act in full and others to the extent that they conflict with them, but we think the rule is that neither express nor implied repeals come within the constitutional prohibition found in said section 18, article 3. Under a constitutional provision similar to our own, the supreme court of Illinois, in *School Directors v. School Directors*, 135 Ill. 464, 10 N. E. 49, said: "Two or more laws relating to the same subject or different parts of the same subject matter are not necessarily amendatory to each other, within the meaning of the clause of the constitution, although they may be construed together as *in pari materia*. All laws on the subject of schools, in city charters or elsewhere, are necessarily parts of school laws."

Said act of 1905 is valid and constitutional, and the peremptory writ of mandate must be issued as prayed for, and it is so ordered.

Stockslager, C. J., concurs.

Malshie, J., concurs, to the extent only that the law of 1905 is valid and constitutional.

Points Decided.

(April 16, 1906.)

**ELMER R. DEWEY et al., Respondents, v. SCHREIBER
IMPLEMENT COMPANY, Appellant.**

[85 Pac. 921.]

**CONSTITUTIONAL LAW—JURISDICTION OF PROBATE COURTS—LIENS AND
MORTGAGES—ACTIONS AT LAW—COURTS OF RECORD—LAW AND
EQUITY—AMENDMENT TO SECTION 3841, REVISED STATUTES VOID.**

1. Under the organic act of the territory of Idaho from its passage to December 13, 1870, the probate courts of the territory of Idaho had no jurisdiction to hear and determine civil cases, but had original jurisdiction in all matters of probate, settlement of estates of deceased persons and appointment of guardians. On the thirteenth day of December, 1870, Congress passed an act giving to the probate courts of Idaho territory, in addition to their probate jurisdiction, jurisdiction to hear and determine all civil cases wherein the debt or damage claimed did not exceed the sum of \$500, exclusive of interest, and jurisdiction in criminal cases arising under the laws of the territory that did not require the intervention of a grand jury.

2. Under the provisions of section 21 of article 5 of the state constitution probate courts are given original jurisdiction in all matters of probate, settlement of estates of deceased persons and appointment of guardians, and also jurisdiction to hear and determine all civil cases wherein the debt or damage claimed does not exceed the sum of \$500 exclusive of interest, and concurrent jurisdiction with justices of the peace in criminal cases.

3. The civil cases referred to in said section are such cases as are required to be settled in actions at law, and do not include suits in equity for the foreclosure of liens or mortgages on real estate.

4. Probate courts are courts of record only in matters of probate, settlement of estates of deceased persons and the appointment of guardians, and are not courts of record in proceedings in civil and criminal actions.

5. While by the provisions of section 1, article 5 of the state constitution the distinctions between actions at law and suits in equity and the forms of such actions and suits are prohibited, that does not abolish the rules of law and equity.

Argument for Appellant.

6. The legislative act approved February 27, 1903 (Sess. Laws, p. 94), amending the ninth subdivision of section 3841, Revised Statutes, wherein it extends the jurisdiction of the probate court to try and determine actions to enforce mechanics' and laborers' liens and mortgages and other liens upon real property, *held*, unconstitutional and void.

(Syllabus by the court.)

APPEAL from the District Court of the Second Judicial District for Latah County. Hon. Edgar C. Steele, Judge.

Action to foreclose laborers' liens. Judgment for the plaintiffs. *Reversed*.

S. S. Denning and George G. Pickett, for Appellant.

The provision in Session Laws of Idaho of 1903, page 94, extending to probate courts jurisdiction to foreclose real and personal mortgages, and also all liens up to an amount of \$500, confers, on the said court, general equity jurisdiction, and is unconstitutional. (Idaho Const., art. 5. secs. 20, 21; Idaho Rev. Stats. 1887, sec. 3841, subd. 9; *People v. Durrell*, Idaho, 44; *Moore v. Koubly*, 1 Idaho, 55; *Ferris v. Higley*, Idaho, 44; *Clayton v. Utah*, 132 U. S. 632, 33 ed. 455, 10 Sup. Ct. Rep. 190; *Perea v. Berela*, 5 N. Mex. 3, 23 Pac. 766; *Perea v. Berela*, 6 N. Mex. 239, 27 Pac. 507; *Marshall v. Marshall*, 11 Colo. App. 505, 53 Pac. 617; *McCray Baker*, 3 Wyo. 192, 18 Pac. 749; *Wetz v. Eliot*, 4 Okla. 618, 18 Pac. 657; Sess. Laws, 1905, p. 28; Rev. Stats., sec. 4666, subs. 15; secs. 4668-4675; *Locknane v. Martin*, 1 McCahon (Kan.), 60; *Dewey v. Dyer*, 1 McCahon (Kan.), 77; *Mayberry Kelley*, 1 Kan. 116; *Bean v. Given*, 5 Idaho, 774, 5 Pac. 987.)

The fathers of the constitution intended to adopt, and did adopt, subdivision 9 of section 3841, Revised Statutes, as being within the limit of the civil jurisdiction of probate courts conferred by section 21 of article 5 of the constitution, and as it had been interpreted both by the supreme court and the legislature of the territory. Congress expressly withheld chancery powers

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and the constitution never intended to confer it. (*Christensen v. Hollingsworth*, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211; *Quayle v. Glenn*, 6 Idaho, 549, 57 Pac. 308.)

Forney & Moore and W. N. Morgan, for Respondents.

Instead of restricting the jurisdiction of the probate courts the object of the framers of the constitution was to leave the jurisdiction open, so that it might be enlarged when deemed necessary by the legislature. When a purpose or a prior law is continued, usually its words are continued, and an omission of the words implies an omission of the purpose. (*Pirie v. Chicago Title Co.*, 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906.)

The supreme court of Colorado, under a constitutional provision similar to ours, has uniformly held that the legislature could confer equity jurisdiction on the county courts. (*Arnett v. Berg*, 18 Colo. App. 341, 71 Pac. 636.)

SULLIVAN, J.—This action was brought in the probate court of Latah county, to foreclose two laborers' liens against the appellant Jones, who was the employer, upon the same crop of grain. The other appellants were interpleaded as defendants. The complaint contained the usual allegations of a complaint in this kind of an action. The appellant Jones appeared and demurred, and his demurrer being overruled, made no further appearance in the case. The respondents, Miller and Mannering, did not appear, and the appellant, the Schreiber Implement Company, answered and put in issue the material allegations of the complaint, and for an affirmative defense they denied the jurisdiction of the probate court to hear and determine an action for the foreclosure of laborers' liens, and also that the claim of the respondent Brewster was fraudulent. Other matters of affirmative defense were set up, but it is not necessary to state them here. After a trial of the case, the court entered judgment and decree foreclosing

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said laborers' liens. The appeal is from the judgment, and the main question for decision involves the jurisdiction of the probate court to hear and determine equity suits foreclosing liens upon real estate and the constitutionality of an act approved the twenty-seventh day of February, 1903 (Sess. Laws, p. 94), amending section 3841 of the Revised Statutes, relating to the jurisdiction of probate courts. Prior to that amendment it is not contended that the probate court had equity jurisdiction to hear and determine equity cases. In order to determine this question we shall trace the jurisdiction of our probate courts during our existence as a territory and state. The organic act was the constitution of the territory up to the time Idaho was admitted as a state. Prior to December 13, 1870, the probate courts of the territory of Idaho had no jurisdiction to hear and determine civil cases, but on that date Congress passed an act giving to probate courts, in addition to their probate jurisdiction, jurisdiction to hear and determine all civil cases wherein the debt or damage claimed did not exceed the sum of \$500, exclusive of interest, and jurisdiction in criminal cases arising under the laws of the territory that did not require the intervention of a grand jury. In that act of Congress it is also provided as follows: "That they (probate courts) shall not have jurisdiction in any matter in controversy when the title, tenure or right to the peaceable possession of land may be in dispute or in chancery or divorce cases." That act of Congress continued in force and defined the jurisdiction of probate courts up to the time of Idaho's admission as a state. We will observe here the territorial legislature passed an act conferring appellate jurisdiction upon the probate courts in civil cases, and in *Moore v. Koubly*, 1 Idaho, 55, the supreme court of the territory held said act in conflict with the organic act of the territory and void. The opinion in that case is an interesting one and holds that the probate courts of the territory of Idaho as established by the organic act were tribunals of limited jurisdiction, and that the name or terms by which those courts are designated have a clearly defined or well-

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known meaning in our jurisprudence. And the nature and scope of authority possessed by the probate courts are well understood by the name of those courts, and it is there stated, "And yet no one would contend for a moment that because the legislature are not inhibited by express terms, therefore they may confer, for instance, chancery powers upon justices' courts." And the conclusion reached in this case was that when Congress used the terms by which they designated the probate courts, they intended to and did use those terms by which such courts were denominated with reference to their well-known and uniformly accepted definition, and they intended to confer upon and invest these courts, respectively, with such jurisdiction and such powers only as legitimately and properly belonged to them as indicated by their titles, and the court there held said act of the legislature in conflict with the organic act. After that decision was rendered, in 1866, and no doubt sufficient reason appearing therefor, Congress passed the act of 1870 above referred to, conferring additional jurisdiction on the probate courts, in that it gave them jurisdiction to hear and determine civil cases wherein the debt or damage did not exceed \$500, and criminal jurisdiction concurrent with justices of the peace. (See, also *Ferris v. Higley*, 20 Wall. 375, 22 L. ed. 383.)

The framers of the constitution of the state of Idaho, by section 2 of article 5, have declared that the judicial power of the state shall be vested in a court for the trial of impeachments, a supreme court, district court, probate courts, courts of justices of the peace, and such other courts inferior to the supreme court as may be established by law for incorporated city or town. By section 9 of that act the jurisdiction of the supreme court is defined. By section 20 it is provided that district courts shall have original jurisdiction in all cases both at law and in equity, and such appellate jurisdiction as may be conferred by law. Section 21 of said article is as follows: "The probate courts shall be courts of record and shall have original jurisdiction in all matters of probate settlement of estates of deceased persons, and appointment

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of guardians; also jurisdiction to hear and determine all civil cases wherein the debt or damage claimed does not exceed the sum of five hundred dollars, exclusive of interest and concurrent jurisdiction with justices of the peace in criminal cases." We do not think that the framers of the constitution intended to grant equity jurisdiction to probate courts outside of whatever equity jurisdiction they may have in all matters of probate, settlement of estates of deceased persons and appointment of guardians. It is suggested that the probate courts of the state of Colorado under the provisions of the constitution of that state have been given equity jurisdiction at least as far as the foreclosure of liens and mortgages are concerned. But it will be observed that section 23, article 6 of the constitution of that state is different from said section 21, article 5 of the constitution of Idaho, and provides that "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate . . . and such other civil . . . jurisdiction as may be conferred by law." That constitution there provides that other jurisdiction may be conferred on the county courts by law. Said section of the Colorado constitution is cited by the supreme court of Colorado in *Arnett v. Berg*, 18 Colo. App. 341, 71 Pac. 636, and it is said in that case that "a recognition of the equitable jurisdiction of the county court appears throughout our constitutional and statutory law. Were it necessary to invoke it, the unchallenged practice in the state during more than a quarter of a century could be given weight in support of the conclusion we have reached." That statement could not be applied to the probate courts of this state, for I do not think the legal profession or courts of this state ever considered that the probate courts of the state had any equitable jurisdiction in civil cases, at least prior to the amendment of said section 3841 of the Revised Statutes made in 1903 and above referred to. The unchallenged practice of this state during Idaho's existence as a territory and state would give weight in support of the conclusion that the probate courts of the state have no equity jurisdiction.

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The probate courts of this state are courts of record only in all matters of probate, settlement of estates of deceased persons, and appointment of guardians, and section 3842 of the Revised Statutes provides that the proceedings of probate courts are construed in the same manner and with like intendment as the proceedings of courts of general jurisdiction, and to its records, orders, judgments and decrees there is accorded like force and effect and legal presumptions as to the records, orders, judgments and decrees of district courts, and it is there provided that said section shall be applicable to probate proceedings, records, orders, judgments and decrees only. The probate court is not a court of record in the trial of civil and criminal cases, but its record and judgments in those matters are placed on the same footing with the records and judgments of justices of the peace. By an act of the legislature which became a law on the second day of February, 1905 (Sess. Laws, p. 29), it is provided that in all civil suits and within its civil jurisdiction all proceedings in the probate court, rules of practice, pleading and procedure shall be the same as that provided by law for justices of the peace. The pleadings in justices' courts by the provisions of section 4666 of the Revised Statutes are not required to be in any particular form, and may be oral except the complaint, and the lawyer as well as the layman cannot fail to understand in what an uncertain condition the title to real estate might be left and placed by giving jurisdiction to foreclose liens and mortgages to courts where the practice proceedings and records are as loose and uncertain as they are in the justices' court. This suggestion, however, would not affect the constitutionality of said act extending the jurisdiction of probate courts if that was warranted by the constitution. If the contention of the respondent is correct, then the legislature has the authority to confer general equity jurisdiction on the probate court in all civil cases where the debt or damage does not exceed \$500, and might give them jurisdiction to hear and determine divorce cases. If probate courts have jurisdiction in such cases, the title to

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al estate involved in the foreclosure of liens and mortgages could to a certain extent be dependent upon the records of a court that is not a court of record, would be shadowy and very uncertain indeed, and not as permanent as our law contemplates such titles should be. We do not think that was the intention of the framers of the constitution, but it is clear to us that the intention was to confer only jurisdiction to hear and determine actions at law where the debt or damage exclusive of interest, does not exceed \$500. We recognize the fact that the distinction between suits in equity and actions at law has been prohibited, and that in this state there is but one form of action for the enforcement or protection of private rights or redress of private wrongs, which is denominated as a civil action. That, however, does not abolish the rules of law or rules of equity; they remain, although the distinction between the actions at law and suits in equity and the forms of such actions and suits are prohibited by our constitution.

We therefore conclude that the amendment to paragraph 9 of section 3841 of the Revised Statutes, granting to the probate court jurisdiction to hear and determine actions to enforce mechanics' and laborers' liens, mortgages and other liens upon real and personal property, is in violation of the provisions of the clearly implied prohibition of section 21 of article 5 of the state constitution, and void. The judgment is therefore reversed and the case remanded, with instructions to dismiss the action. Costs in favor of the appellant.

Stockslager, C. J., and Ailshie, J., concur.

Argument for Appellant.

(April 17, 1906.)

TOWN OF JULIAETTA (a Municipal Corporation), Respondent, v. H. M. SMITH, Appellant.

[85 Pac. 923.]

WHAT CONSTITUTES ROADS AND HIGHWAYS—FIVE YEARS' PUBLIC USE AND WORK BY COUNTY OR OTHER MUNICIPAL CORPORATION CONSTITUTES.

1. Under the provisions of section 851, Revised Statutes of Idaho, five years' use of a road or highway constitutes a public highway.

2. By the amendment to section 851 (Sess. Laws 1893, p. 12), five years' use and work by the proper authorities is required to constitute a public highway by prescription.

(Syllabus by the court.)

APPEAL from the District Court of the Second Judicial District for Latah County. Hon. E. C. Steele, Judge.

Plaintiff commenced its action to remove an obstruction from a street or highway and for damages. Judgment for plaintiff that the nuisance be abated, from which, and an order overruling a motion for new trial, defendant appeals. *Affirmed.*

Daniel Needham, for Appellant.

The doctrine of user does not apply to duly laid out and recorded highways, and the respondent is entitled to the twenty-foot alley and no more. (*Pillsbury v. Brown*, 82 Me. 450, 19 Atl. 858, 9 L. R. A. 94; *Crossman v. Vignaud*, 14 La. 173.)

The doctrines of dedication and prescription are applicable to all public ways, such as alleys, footways and the like (*Kimball v. City of Kenosha*, 4 Wis. 321, 336.) Mere user is not evidence of dedication. (*Gardiner v. Tisdale*, 2 Wis. 153 60 Am. Dec. 407.)

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The recording of the plat of the town of Juliaetta and the filing of lots in accordance therewith was an express dedication by Mr. Schupfer, and is the only competent evidence of his intentions, and the same became an irrevocable grant when third persons acted upon it. User cannot be invoked against Schupfer. (*Long v. Battle Creek*, 39 Mich. 323, 33 N. H. Rep. 384; *Fisher v. Brose*, 2 Best & S. 780; *Boughner v. Clarksburg*, 15 W. Va. 394; *Hogue v. City of Albina*, 20 W. Va. 182, 25 Pac. 386, 10 L. R. A. 673; *City of Topeka v. Atchison*, 48 Kan. 345, 29 Pac. 560, and cases cited therein.)

Orland & Smith, for Respondent.

The town of Juliaetta is a municipal corporation under the laws of the state of Idaho. Even if not organized with regular legal proceedings, it would be a municipal corporation by prescription. (*Bassett v. Porter*, 4 Cush. (Mass.) 487; *Allen v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 491; *Robie v. McGraw*, 35 Barb. (N. Y.) 319; *People v. Maynard*, 15 Mich. 33, 28 Am. & Eng. Ency. of Law, 2d ed., p. 288.)

The appellant, being a private person, cannot question the fact of whether respondent is an incorporated town or not. 3 Am. & Eng. Ency. of Law, 2d ed., 289.)

STOCKSLAGER, C. J.—Respondent commenced this action in the district court of Latah county for the purpose of preventing the alleged obstruction to a certain traveled highway in the town of Juliaetta, claiming that the tract traveled was and is a highway by user; that the road has been used by the general public for travel since March, 1887, and more than five years before the filing of the plat of the town of Juliaetta by Rupert Schupfer. It is alleged that appellant has placed certain obstructions, and threatens to continue to place such obstructions over a portion of the street or highway in the town of Juliaetta, thereby interfering with the free use of the street or highway. It is further alleged in paragraph 9 of the complaint "that if defendant is permitted to maintain the said fence and thus obstruct

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that portion of the highway used and worked as the public highway street for so long a period through said town, the safety of the citizens of Juliaetta, and of the traveling public as well, will be endangered, and the town be liable for damages arising from injuries caused by said obstruction over said highway." Appellant denied all the allegations of the complaint and justified all his acts by pleading ownership of the land in controversy.

On the twenty-first day of June, 1905, the case was tried without a jury. The ninth finding is that the travel over said strip or tract of land extends upon lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of block B, and the obstruction by fencing by the said defendant covers that strip of land over said lots and upon the part thereof which has been used and traveled by the public as a highway.

The tenth finding is: "That said obstruction placed by defendant upon and across said lots prevents the public from the use of said strip of land over which the public have been accustomed to travel. That the said strip of land described in the findings has been used and traveled by the public for such length of time that the same has become a highway by user, and that said strip of land is a public highway."

As conclusions of law the court finds: "That the obstructions placed upon such highway are a nuisance and should be abated, and the defendant enjoined from further obstructing said highway." Judgment and decree were entered in compliance with the foregoing facts and conclusions. The appeal is from the judgment and from an order overruling a motion for a new trial.

It is admitted that the appellant is the owner of the ten lots described in finding 9, and that he purchased them from R. Schupfer, the original owner of the townsite of Juliaetta, in 1903. The controlling question in this case is whether the public or the town of Juliaetta could acquire the right to any portion of these lots for use as streets or highways by user. On the twenty-seventh day of November, 1891, Rupert Schupfer made the following certificate of dedication:

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“Know all men by these presents, that I, Rupert Schupfer, have laid off and platted as townsite, the land shown by annexed plat and description to be known as the town of Juliaetta, in Latah county, Idaho, and I do hereby dedicate the public use, until lawfully vacated, the streets and alleys shown on said plat. The sizes of lots, blocks, streets and alleys are marked on plat.”

On the twenty-sixth day of March, 1892, a petition to incorporate the town of Juliaetta was filed with the clerk of the board of commissioners, and on the nineteenth day of April, 1892, the prayer for such incorporation was granted. It is shown by the plat which is a part of the record that the lots in dispute are between Main and State streets, and that there is an alley running between the streets and through the center of Block B. A number of errors are assigned in the record, but it occurs to us that the settlement of one law question practically disposes of the case. If the town or public can acquire private property for public use by user, then the judgment must be sustained, as we think it is abundantly shown by the record that the portion of the lots in dispute have been used as a highway more than the required statutory time to give the right to use by user, elsewhere than in an incorporated city, village or town. We are of the opinion that the proceedings of the board of county commissioners in their acts and orders relative to the incorporation of the town of Juliaetta were a practical compliance with the statute—even if not organized by a strict compliance with all the provisions of our statute, it would still be a municipal corporation by prescription. (*Bassett v. Porter*, 4 Wash. 487; *Bow v. Allentown*, 34 N. H. 351, 67 Am. Dec. 100; *Robie v. Sedgwick*, 35 Barb. 319; *People v. Maynard*, 10 Mich. 463; 28 Am. & Eng. Ency. of Law, 2d ed., 288.) It is to the right of appellant to question the irregularities, if any, in the organization of the town, see volume 28 of American and English Encyclopedia of Law, second edition, page 100. The author says: “Irregularities in the organization of a town may be waived by the public, and a private person

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cannot question the regularity of a town's existence"; citing authorities. Section 97 of Session Laws of 1899, page 213 dealing with city and village plats, says: "The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is or was such plat set apart for street or other public use."

Learned counsel for appellant insists that "when the plat of Juliaetta was recorded and lots sold in accordance therewith, the dedication became complete, and when the town incorporated it accepted the plat, and streets and alleys delineated thereon at once became the public thoroughfares of said town, and all persons who bought property in said town had notice as to what said incorporation claimed for its streets and alleys, and would be estopped to claim anything other or different than that shown on the plat. Such being the case with purchasers, the same doctrine will hold good as to the corporation, for, should the theory of plaintiff obtain in this case, then every person who buys a lot in accordance with a plat in an incorporated town or village in this state would have to inclose the same at once or stand guard over his property to keep the public from acquiring title thereto by user." There is much force, reason and equity in this contention, and unless the public had acquired a right to the use of this land for a public highway prior to the time Mr. Schupfer platted the townsite of Juliaetta and dedicated the streets and alleys to the use of the public, the judgment is erroneous and should be reversed.

The eighth finding of the court is, "That the defendant has obstructed said strip of land over which the general public have traveled since about the month of March, 1887, by building, erecting and maintaining a fence over said land and over and across said land where and upon that part of said strip of land which the public were and have been during said time in the habit of traveling, and over and across that part where the track has been situated, and has by such fence obstructed and prevented the public from traveling upon the beaten track of said road or traveling upon the

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part of said strip where the general public have traveled since about the month of March, A. D. 1887." A number of witnesses testified with reference to the use of the land in controversy as a highway from March, 1887, and since the platting and incorporation of the town of Juliaetta until it was annexed by appellant in 1903. There are conflicts in the evidence as to the use of this land for highway purposes, but an examination of the evidence shown by the transcript we think fully supports finding 8 above quoted, hence it became a public highway by prescription prior to the filing of the plat and dedication of the streets and alleys for the use of the public. There is nothing in the record showing that Mr. Schupfer ever objected to the use of these lots for a highway, or that there was any opposition from anyone until appellant purchased the lots and built his fence and inclosed what he believed to be his property.

Section 851 of the Revised Statutes, providing what shall constitute roads and highways in this state, says: "Roads laid out and recorded as highways by order of the board of commissioners, and all roads used as such for a period of five years shall be highways." This section was amended by the second session of the state legislature as follows: "Roads laid out and recorded as highways by order of the board of commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways." (Sess. Laws 1893, p. 12.) By the finding of the court the road or highway in controversy was a public highway within the meaning of the general statute of 1889, or the act of the state legislature at its second session in 1893.

The supreme court of California in *Bolger v. Foss*, 65 Cal. 30, 3 Pac. 871, construed a statute relative to roads and highways and what constituted them. The first clause of the syllabus says: "Section 2619 of the Political Code which provided that 'All roads used as such for a period of more than five years are highways.' " In the opinion it is said: "But

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where there is a statute that roads shall be deemed public highways which have been used as such for a named period, the right of the public to continue to use them as public roads is fixed and established." (Citing Angell on Highways, sec. 131.)

Again, in *McRoss v. Buttyer*, 81 Cal. 122, 22 Pac. 393, the same doctrine is announced. (See, also, *Freshour v. Hihn*, 99 Cal. 443, 34 Pac. 87.)

In *Getchell v. Benedict*, 57 Iowa, 121, 10 N. W. 321, it is said in the syllabus: "When plaintiff received a conveyance of a certain lot according to a plat which did not recognize a highway dedicated by acts *in pais* prior to the filing of such plat, held that they were not thereby estopped from asserting the existence of such highway."

It is held in *City of Louisville v. Brewer's Admr.* (Ky.), 72 S. W. 9: "Where a county road was taken into a city by annexation of the territory which it traversed, it became a city street without formal action on the city's part." (See, also, sec. 1009, same volume.)

2 Dillon on Municipal Corporations, 4th ed., sec. 637. Also

In *Ford v. Chicago etc. Assn.*, reported in 155 Ill. 166, 39 N. E. 650, 657, it is said: "A public highway arises by prescription where there has been an adverse user of the easement continued for a period fixed by law." Citing 19 American and English Encyclopedia of Law, page 7, where it is said: "Prescription is made by acquiring title to incorporated hereditaments by immemorial or long-continued use." (See, also, page 11, same volume.) *Gross v. McNutt*, 4 Idaho, 286, 38 Pac. 935, is decisive of this case.

We do not deem it necessary or useful to prolong this discussion or cite additional authorities. It is apparent from the record that the findings of fact were justified by the evidence, and from the authorities above cited and quoted from we think the court reached the proper conclusion of law.

Many assignments of error occurring at the trial are contained in the record, but it is unnecessary to pass upon them in our view of the case. The only serious question presented

Points Decided.

the record is whether the road passing over the property controversy is a public highway within the meaning of our statute as amended by Session Laws of 1893, *supra*, and since we have found under the evidence and authorities that such is true, it ends the controversy. Judgment is affirmed with costs to respondent.

Ailshie, J., and Sullivan, J., concur.

(April 18, 1906.)

H. WILSON, Respondent, v. WILLIAM DOYLE, Appellant.

[85 Pac. 928.]

APPEAL FROM JUSTICE'S COURT—SUFFICIENCY OF UNDERTAKING ON APPEAL AND FOR STAY OF PROCEEDINGS—DISMISSAL OF APPEAL.

1. Where an appeal is taken from a justice's court and the appellant claims a stay of proceedings, under section 4842, Revised Statutes, it is necessary to give two obligations (which may both be in the same undertaking), one in the sum of \$100, to cover costs of the appeal, and the other in twice the amount of the judgment, including costs.

2. An undertaking in twice the amount of the judgment, including costs, for the stay of proceedings is ineffectual for any purpose where there is no obligation "for the payment of the costs on the appeal," and in such case the appeal is properly dismissed.

(Syllabus by the court.)

APPEAL from the District Court of the First Judicial District for the County of Kootenai. Hon. Ralph T. Morgan, Judge.

Respondent obtained a judgment in a justice's court and the defendant appealed to the district court. The appeal was dismissed by the district court and judgment of dismissal thereupon entered, from which judgment the defendant appealed to the supreme court. *Judgment affirmed.*

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Charles L. Heitman, for Appellant, cites no authorities on points decided by the court.

Thomas H. Wilson, *pro se*.

The correlative "or" in the statute, section 4844, which section is identical with the California code, section 978, has received the judicial construction of "and." (*McConkey v. Superior Court*, 56 Cal. 83; *Numbers v. Rocky Mountain Bell Tel. Co.*, 7 Idaho, 408 (last paragraph at p. 413), 63 Pac. 381).

The undertaking recites whereas "defendant is desirous of appealing," and "a stay of proceedings is claimed." It would seem to be void for uncertainty, especially as to the appeal. (*Kelly v. Leechman*, 5 Idaho, 521, 51 Pac. 407, and cases there cited; *Carter v. Butte Creek Gold Mine & P. Co.*, 131 Cal. 350, 63 Pac. 667.)

The appeal bond must conform to the terms of the statute. (*Johnson v. Letson*, 3 Ariz. 344, 29 Pac. 893.)

A stay bond does not do this. (*Duff v. Greenbaum*, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323, approved by same court in *Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 Pac. 147.)

The obligors are held according to the terms of their bond only. (*People v. Breyfogle*, 17 Cal. 504, 508.) Hence would not be held for costs on appeal in this case.

AILSHIE, J.—This case was instituted in the justice's court of Harrison precinct, Kootenai county. Judgment was entered for the plaintiff, and the defendant appealed to the district court. On motion of the plaintiff the appeal was dismissed by the district court and judgment of dismissal was thereupon entered, from which the defendant has appealed to this court. It is contended by respondent here that the appeal was properly dismissed for the reason that the defendant and appellant failed to give an undertaking on appeal as provided by section 4842, Revised Statutes, and if that contention is correct, the judgment of the lower court in dismissing the appeal should be affirmed.

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The judgment entered in the justice's court was for \$80.60, principal, and \$3.80 costs. The undertaking on appeal was given for the sum of \$200. The conditions of the undertaking which are material to the consideration of the bond under discussion are as follows: "And, whereas, the above defendant is desirous of appealing from the decision of said justice of the district court at Rathdrum, in and for the county of Bladen, state of Idaho, and a stay of proceedings is claimed: 'Now, if the above defendant, William Doyle, shall well and truly pay, or cause to be paid, the amount of said judgment and all costs, and obey any order the said district court may make therein, if the said appeal be withdrawn or dismissed, or pay the amount of any judgment, and all costs that may be recovered against the said district court, then this obligation to be null and void; otherwise to remain in full force and virtue.'"

The appellant contends that while the undertaking was not sufficient to stay proceedings in the justice's court, that it did constitute a sufficient undertaking on appeal. Respondent, on the other hand, contends that under section 4842 the undertaking is, if anything, merely a stay bond and in no respect an appeal bond.

The supreme court of California in *McConkey v. Superior Court*, 56 Cal. 83, in construing section 978 of the Code of Civil Procedure of that state, which is the same as section 4842 of our statute, held that "the word 'or' in section 978 of the Code of Civil Procedure, joining the clauses referring respectively to the undertaking for costs on appeal and the undertaking for a stay of proceedings, is to be read 'and,' and in all cases the former undertaking is essential."

Our own supreme court in *Numbers v. Rocky Mountain Bell Telephone Co.*, 7 Idaho, 408, 63 Pac. 381, said: "We think it best, however, to suggest that said section 4842 of the Revised Statutes requires, in cases of appeal from justices of the peace to the district court where execution of the judgment is stayed, two obligations (may be in the same undertaking) one in the sum of \$100 to cover costs of appeal; the other to double the amount of the judgment and costs in the jus-

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tice court, to secure the payment of whatever judgment and costs may finally be recovered by the respondent against the appellant." It is clearly apparent from the context of section 4842 that where an appellant seeks a stay of proceedings, it is necessary to have two obligations—which, of course, may both be in the same undertaking—one to cover costs of appeal and the other in double the amount of the judgment and costs entered in the lower court. In this case the undertaking is not sufficiently large for both purposes. The obligation of the sureties on the bond is to pay the judgment, including costs, entered in the lower court, or the amount of any judgment and costs entered in the appellate court. The statute, however, requires an appeal bond in the sum of \$100 "for the payment of the costs on the appeal," which is an entirely different thing from the payment of the judgment and costs entered in the lower court. The undertaking given in this case would doubtless be sufficient for a stay of proceedings, but since there is no undertaking on appeal, there is nothing to be stayed. The bond is not a sufficient appeal bond. It is too indefinite and uncertain to sustain a construction that would make it cover the appeal. We therefore conclude that there was no error in the district court dismissing the appeal, and the judgment will, therefore, be affirmed. Costs awarded to respondent.

Stockslager, C. J., and Sullivan, J., concur.

Argument for Appellant.

(April 18, 1906.)

WILLIAM J. RUSSELL, Appellant, v. A. V. CHAMBERLAIN et al., Respondents.

[85 Pac. 926.]

MALICIOUS PROSECUTION—DEFENDANTS JOINED—WANT OF PROBABLE CAUSE AND MALICE—ALLEGATIONS OF COMPLAINT—DEMURRER.

1. It is not necessary in an action for malicious prosecution to allege that all of the defendants combined in instituting the proceedings complained of. If, after the proceedings were commenced, they, without probable cause and with malice, participate voluntarily in the prosecution, they may be joined in an action as defendants with the person or persons who instituted the action.

2. Want of probable cause and malice must coexist.

3. Actions for malicious prosecutions are not favored in law and have been hedged about by limitations more stringent than in many other acts causing damage to another.

4. *Held*, that the complaint states a cause of action and that the court erred in sustaining the demurrers thereto.

(Syllabus by the court.)

APPEAL from the District Court of the First Judicial District for Kootenai County. Hon. Ralph T. Morgan, Judge.

Action for malicious prosecution. Demurrer to complaint sustained and judgment of dismissal entered. Judgment reversed.

R. E. McFarland, for Appellant.

It is not necessary to prove that the defendants were originators of the proceedings complained of. If they participated voluntarily in the malicious prosecution, and was carried out with their countenance and approbation, they will be liable. (Newell on Malicious Prosecution, 368; Linkaid on Torts, par. 55; *Stansbury v. Fogle*, 37 Md. 369; *Muldin v. Ball*, 104 Tenn. 597, 58 S. W. 248; *Dreux v. Nec*, 18 Cal. 83; *Finley v. St. Louis Ref. & W. G. Co.*, 99 559, 13 S. W. 87; *Porter v. Martyn* (Tex. Civ. App.), 32

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S. W. 731; *Brown v. Chadsey*, 39 Barb. 253; *Christian v. Hanna*, 58 Mo. App. 37.)

McClea & Burgan and Robert H. Elder, for Respondents.

In this case there is no charge against any of the respondents having commenced, advised or instigated the prosecution, and the complaint does not state facts sufficient to constitute a cause of action against any of them.

The essential element of the charge of malicious prosecution, viz., probable cause, is entirely wanting in the case of either one of the respondents who has been served with process.

The test of probable cause is to be applied as to the time when the action complained of was commenced, and facts that came to defendant's knowledge afterward are no protection. (Cooley on Torts, 183.) To support an action for malicious criminal prosecution the plaintiff must prove, in the first place, the fact of prosecution and that the defendant was the prosecutor, or that defendants instigated its commencement and that it terminated in plaintiff's acquittal. (*Wheeler v. Nesbitt*, 24 How. (65 U. S.) 544, 16 L. ed. 765.)

It must appear that the prosecution was instigated by the defendant, and the *onus* is upon the plaintiff to show that the defendant was the prosecutor, and that the prosecution was without reasonable or probable cause. (*Farnum v. Feeley*, 56 N. Y. 454; *Harkrader v. Moore*, 44 Cal. 144.)

SULLIVAN, J.—This is an action to recover damages for an alleged malicious prosecution. Demurrers to the amended complaint were sustained and judgment of dismissal was entered and the plaintiff appeals therefrom. All of the defendants, except Frank M. Crandall, were served with summons and appeared. The defendant Crandall was not served and did not appear. It is alleged in the complaint that on the eleventh day of April, 1904, in Kootenai county, the said Crandall made, signed, swore to and filed with a justice of the peace, in said county, a certain complaint or in-

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formation in writing charging and accusing the plaintiff with having unlawfully, willfully, maliciously and feloniously set fire to and caused to be burned, in the night-time, a certain mercantile warehouse, situated in Coeur d'Alene City, with the intent then and there willfully, maliciously and feloniously to destroy said building, and caused said justice of the peace to issue a warrant for the apprehension and arrest of the plaintiff upon said charge, and that the plaintiff was arrested by virtue of said warrant; that the acts of said Crandall therein were malicious and without reasonable or probable cause. Then follows an allegation that on or about the eleventh day of April, 1904, the defendants, contriving and maliciously intending to injure plaintiff in his good name and reputation, caused him to be imprisoned without any reasonable or probable cause therefor, and wickedly conspired, combined and agreed together among themselves to prosecute plaintiff upon said charge, and procured the plaintiff to be examined before said justice of the peace upon said charge, and by said justice of the peace held over to answer said charge at the next term of the district court in and for said county, and caused him to be imprisoned, informed against and prosecuted in said district court upon said charge; that in pursuance of said conspiracy, the defendants, still contriving and maliciously intending to injure plaintiff in his good name and reputation, and to cause him to be imprisoned without any reasonable cause, therefor, "employed and procured certain detectives to secure the attendance of certain persons to attend before said justice of the peace at said examination and testify under oath against plaintiff, and that said detectives did accordingly procure certain persons to attend and under oath give false and perjured testimony before said examining magistrate against plaintiff in said prosecution." It is also alleged that the defendants procured and employed as private and special counsel an attorney from Spokane, Washington, to assist in the prosecution of the plaintiff. It is also alleged that pursuant to the said conspiracy, the defendants, without reasonable or probable cause, corruptly and wrongfully solicited, requested

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and induced said justice of the peace to hold plaintiff to answer said charge and to fix his bail in a sum beyond his ability to furnish, and that the justice of the peace did so, and fixed his bail at \$5,000; that in pursuance of said conspiracy, the defendants procured the county attorney for said county to make and file in the district court an information in writing charging the plaintiff with said crime, and that thereafter the plaintiff appeared in the district court ready and willing to stand his trial upon said information, whereupon the county attorney on the twenty-fifth day of February, 1905, after consulting and advising with the defendants, and at their request, did then and there move said district court to discharge said plaintiff, which was done, and the plaintiff discharged out of custody, and that said prosecution is wholly ended and determined in favor of the plaintiff. In the eleventh paragraph of the complaint it is alleged that all of the acts of said defendants alleged in the complaint "were malicious and without any reasonable or probable cause therefor, and with the exception of the making and filing of the said complaint or information with said justice of the peace as aforesaid, were committed by the said defendants jointly." Then follows specific allegations of damage, and it is alleged that by reason of the acts complained of the plaintiff has been damaged in the sum of \$20,000, and prays judgment for that amount.

Two demurrers were filed by respective defendants, and the main ground of demurrer in each was that the amended complaint does not state facts sufficient to constitute a cause of action. Those demurrers were sustained and judgment of dismissal was entered.

Two errors are assigned: 1. The court erred in sustaining said demurrers; and 2. The court erred in entering the judgment of dismissal.

It is first contended by counsel for defendants that as the other defendants did not join with Crandall in instituting the criminal prosecution against the plaintiff, they cannot be properly joined with Crandall as defendants in this action. There is nothing in that contention, for in this class of cases

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is not necessary to prove that all of the defendants were instigators of the proceedings complained of. If after the proceedings were commenced they voluntarily conspired and maliciously joined in such prosecution without probable cause, they may be held liable. (1 *Kinkaid on Torts*, par. 55; *Ansbury v. Fogle*, 37 Md. 369; *Mauldin v. Ball*, 104 Tenn. 7, 58 S. W. 248; *Dreux v. Domec*, 18 Cal. 83; *Finley v. St. Louis Ref. & W. G. Co.*, 99 Mo. 599, 13 S. W. 87; *Porter v. Hartyn* (Tex. Civ. App.), 32 S. W. 731.) In order to recover, want of probable cause and malice must coexist, and must be alleged and proved.

The only remaining question before us for decision is whether the amended complaint contains facts sufficient to constitute a cause of action. *In limine*, the action for malicious prosecution is not favored in law, and hence has been hedged about by limitations more stringent than in the case of almost any other act causing damage to another. (*Small v. McGovern*, 117 Wis. 108, 94 N. W. 651; *Grant v. Duell*, 3 Rob. 17, 38 Am. Dec. 228.) In order to recover in this action the plaintiff must allege and prove (1) that there was a prosecution; (2) that it terminated in favor of the plaintiff; (3) that the defendants were prosecutors; (4) that they were actuated by malice; (5) that there was want of probable cause; and (6) the amount of damages sustained by the plaintiff.

Upon a careful consideration of the allegations of the complaint, we conclude that they state a cause of action. The judgment and the order sustaining the demurrers must be set aside and the case remanded, with instructions to the trial court to permit the defendants to answer within a reasonable time. Costs of this appeal are awarded to the appellant.

Stockslager, C. J., and Ailshie, J., concur.

Rehearing denied July 7, 1906.

Statement.

(April 18, 1906.)

FRED J. HORNER, Appellant, v. A. V. CHAMBERLAIN
et al., Respondents.

[85 Pac. 927.]

APPEAL from the District Court of the First Judicial
District for Kootenai County. Hon. Ralph T. Morgan, Judge.

Action for malicious prosecution. Demurrer to complaint
sustained and judgment of dismissal entered. *Reversed.*

This action was commenced to recover damages for malicious prosecution, and the pleadings and questions involved herein are substantially the same as in the case of Wm. J. Russell, Appellant, v. A. V. Chamberlain et al., Respondents, decided at this term of this court and reported in 85 Pac. 926, (*ante*, p. 299), and by stipulation of counsel this case was to follow the decision in the said case of *Russell v. Chamberlain*. On the authority of that case, the judgment in this case must be reversed and the case remanded, with direction to the trial court to overrule the demurrers and to give the respondents a reasonable time in which to answer. Costs awarded to appellant.

Stockslager, C. J., and Ailshie, J., concur.

Argument for Appellant.

(April 19, 1906.)

In re Appeal of HANS J. RICE.

[85 Pac. 1109.]

PUBLIC ADMINISTRATOR—FEES AND COMPENSATION—OFFICIAL LIABILITY.

1. A county treasurer is, under the constitution and laws of this state, *ex-officio* public administrator, and all fees and compensation received by him in his official capacity and as public administrator must be accounted for and reported to his county, and cannot be retained by him for his personal or individual use.

2. By virtue of holding the office of county treasurer, the individual becomes *ex-officio* public administrator, and is thereby and for that reason alone, qualified to become an administrator of an estate under subdivision 9 of section 5351, and section 5682, Revised Statutes, and any and all fees and compensation received by him by reason of discharging such duties belong to the county, and must be accounted for to the county.

(Syllabus by the court.)

APPEAL from the District Court of the First Judicial District for Shoshone County. Hon. Ralph T. Morgan, Judge.

Hans J. Rice, county treasurer of Shoshone county, and *ex-officio* public administrator, appealed from the action of the board of county commissioners of Shoshone county in refusing to him a quarter's salary as county treasurer, which order and action of the board was based on the neglect and refusal of the treasurer to account for the fees and compensation collected by him as public administrator. The district court sustained and affirmed the action of the board of commissioners, and the treasurer appealed therefrom. *Judgment affirmed.*

Henry P. Knight, for Appellant.

There must be a particular grant of authority before the county treasurer can administer any estate. (*Becker v.*

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Solover, 7 Cal. 215, 68 Am. Dec. 237; *Rogers v. Hoberlin*, 11 Cal. 120; *Estate of Hamilton*, 34 Cal. 464.)

He does not administer by virtue of his office, because his duties under appointment by the probate court do not expire with the termination of his office as county treasurer, but he is required to administer to the final distribution of the estate, which frequently requires a term of years. (*Rogers v. Hoberlin*, *supra*; *In re Aveline's Estate*, 53 Cal. 260.)

Section 7, article 18 (fifth amendment), of the constitution of Idaho, relating to compensation of county officers, is not self-executing, and could not go into operation until laws had been enacted pursuant thereto. (*Blake v. Board of Commissioners of Ada County*, 5 Idaho, 163, 47 Pac. 734.)

Section 3 of the act of 1899 (Sess. Laws 1899, 406) provides that the clerk of the district court and *ex-officio* auditor and recorder shall receive a certain salary; that the assessor and *ex-officio* tax collector shall receive a certain salary, and makes no reference to the *ex-officio* public administrator. Under the well-established rules of interpretation of statutes, we must conclude that the legislature provided the fees mentioned in said act for the county treasurer, and at that time understood that the duties of such officer, under appointments made by the probate court, and the fees that he might receive, were not within the purview of its powers, and, therefore, did not legislate in regard to same.

The public administrator has a personal interest in administering upon an estate, and there could be no other personal interest except the interest in his fee. (*In re Healy's Estate*, 122 Cal. 162, 54 Pac. 736; *McLaughlin's Estate*, 103 Cal. 429, 37 Pac. 410; *In re Pingree's Estate*, 100 Cal. 78, 34 Pac. 521; *State v. Woody*, 20 Mont. 413, 51 Pac. 975.)

The right of the court to appoint an administrator for the estate of deceased persons is discretionary, and the public administrator is not entitled to such appointment as a matter of right. (*In re Harrison's Estate*, 135 Cal. 7, 66 Pac. 846.)

The public administrator has no power "*virtute officii*" to administer an estate unless the authority to do so has been

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regularly conferred upon him by a court of competent jurisdiction. His commission as a public officer will not suffice. (1 Abbott's Probate Law, art. 695.)

In New York and Missouri, the public administrator does administer under the statute by virtue of his office, and a particular grant of letters is not necessary, but that is not the rule in any of the Pacific states where the office is known.

James E. Gyde, for Respondent.

The county treasurer, who is *ex-officio* public administrator, is a county officer (Idaho Const., sec. 6, art. 18), and therefore comes under the provisions of section 7, article 18, and section 9, article 18 of the constitution of Idaho, in regard to accounting to the county for fees. (*Hillard v. Shoshone County*, 3 Idaho, 107, 27 Pac. 678; *Ada County v. Gess*, Idaho, 611, 43 Pac. 71; *Guheen v. Curtis*, 3 Idaho, 443, 31 Pac. 805; *Ada County v. Ryalls*, 4 Idaho, 365, 39 Pac. 556; *Woodward v. Board of Commrs.*, 5 Idaho, 524, 51 Pac. 143.)

Where no provision is made by law for the services of a public officer, it is to be assumed that he is to perform such services *gratis*, be such services ever so meritorious, and the court has no power in such cases to extend the statute so as to allow compensation, even though the failure to provide compensation is an oversight. (23 Am. & Eng. Ency. of Law, 390, and numerous cases cited there; *Garfield County v. Leonard*, 26 Colo. 145, 57 Pac. 693; *Mechem on Public Officers*, sec. 856.)

The public administrator, after his term of office has expired, is not compelled to act. He may, by rendering his account and by proper petition, be relieved from the duties at any time. (*Los Angeles County v. Kellogg*, 146 Cal. 590, 10 Pac. 861.)

AILSHIE, J.—The only question to be determined on this appeal is whether or not the fees collected by the public administrator in administering upon estates under appointment and in the capacity of public administrator must be turned

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in to the county or may be retained by him for his personal and individual benefit. Section 6 of article 18 of the constitution makes the county treasurer *ex-officio* public administrator. Chapter 13 of title 10 of the Code of Civil Procedure of 1887 prescribes the duties of the public administrator. By the provisions of that chapter he is required to give a separate bond in a sum not less than \$2,000, conditioned as other official bonds; and section 5681 makes it his duty to take charge of certain estates therein enumerated without appointment and to administer same forthwith (section 5682). Section 5351, Revised Statutes, prescribes the order in which various persons and classes of persons are entitled to administer upon estates of deceased persons, and names the public administrator as ninth in order. An examination of the constitution and the various statutory provisions makes it clear to us that the county treasurer has certain official duties to perform and discharge as public administrator, and it is equally as clear that any fees or compensation received or collected by him for the discharge of such duties are necessarily received in his official capacity and chargeable to him in the same capacity. The fifth amendment to the constitution, being the amendment to section 7 of article 18, provides that all county officers and their deputies shall receive as "full compensation for their services fixed annual salaries to be paid quarterly out of the county treasury as other expenses are paid." The same section further provides that; "All fees which may come into his hands from whatever source over and above his actual necessary expenses shall be turned into the county treasury at the end of each quarter. He shall, at the end of each quarter, file with the clerk of the board of county commissioners a sworn statement accompanied by proper vouchers, showing all expenses incurred and all fees received, which must be audited by the board as other accounts."

Section 9 of article 18 makes it a felony for any county officer to neglect or refuse to comply with the provisions and requirements of section 7. Section 1 of the salary act of 1899 (Sess. Laws, 1899, p. 405) is a substantial reiteration of the

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Constitutional requirements hereinbefore referred to, and especially provides that the salaries of the various county officials shall be full compensation for the discharge of all their official duties and services. We have no hesitancy, therefore, in holding that all fees and compensation received by the public administrator as such, and in his official capacity, must be accounted for by such officer, and are chargeable against him and the county. In the case at bar it is stipulated that the officer "collected various fees for services performed by him under appointments made by the probate court, which said appointments were made because he was public administrator, administering upon divers estates of deceased persons by virtue of such appointments." It will be seen from the stipulation that the appellant admits in this case that he has received fees and compensation in his capacity as public administrator. It therefore becomes unnecessary for us to determine in this case as to whether or not the public administrator is in fact entitled to charge and collect fees for administering on estates. We do hold, however, that he must account to his county for any and all fees which he has collected as such officer. The same course of reasoning adopted by this court in *Hillard v. Shoshone County*, 3 Idaho, 107, 31 Pac. 678, *Guheen v. Curtis*, 3 Idaho, 443, 31 Pac. 805, *Ada County v. Gess*, 4 Idaho, 611, 43 Pac. 71, and *Ada County v. Ryalls*, 4 Idaho, 365, 39 Pac. 556, is applicable in the case at bar. Counsel for appellant has placed considerable stress on the fact that one who is holding the office of county assessor might, under section 5351, Revised Statutes, become entitled to administer upon an estate by reason of the relation he sustained to the deceased person and in preference to his right as public administrator, and that in such event he could not be required to account for the fees and compensation received in the course of such administration. That question does not arise in this case, and we do not feel it need be discussed upon to discuss it here. It is worthy of note that in every instance, except that of public administrator, it is necessary to petition the probate court for appointment, and to give public notice and have a time fixed for hearing on the

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application, and, after appointment is made, bond must be given. On the other hand, none of these things are necessary to entitle the public administrator as such to administer. It will be observed from section 5682, Revised Statutes, that letters may issue without notice, and that it is not even necessary for the public administrator to file an oath in each case.

The judgment must be affirmed, and it is so ordered. Costs awarded to respondent.

Stockslager, C. J., and Sullivan, J., concur.

(April 26, 1906.)

STATE, Respondent, v. MILT SIMES, Appellant.

[85 Pac. 914.]

CRIMINAL LAW—RAPE—LUNATIC CANNOT CONSENT—LUNATIC AS WITNESS—COMPETENCY OF WITNESS—CREDIBILITY OF WITNESS—LEADING QUESTIONS.

1. Under section 5957, Revised Statutes, which provides that persons "of unsound mind at the time of their production" cannot be witnesses, a person who can apprehend the obligation of an oath and is capable of giving a fairly correct account of the things he has seen or heard is competent as a witness, although he may be afflicted with some form of insanity.

2. The examination of the person offered as a witness for the purpose of testing his competency should be made with special reference to the scope of inquiry and subject matter about which the witness is to testify.

3. Incapacity to give intelligent and legal consent to the commission of an act does not necessarily imply incapacity to thereafter correctly and truthfully narrate the facts constituting the commission of the act.

4. The fact that the state accuses a defendant with rape in having had carnal knowledge of a female who was at the time of unsound mind and incapable of giving consent does not *per se* establish the incompetency of such female to testify against the accused.

Argument for Appellant.

5. *Id.*—In such case the accused may object to the witness testifying on the grounds of incompetency, and the court will examine into and pass upon the grounds of the objection in the same manner and to the same extent as if made against the competency of any other witness.

6. Where objection is made as to the competency of a witness to testify, the court should examine the witness for the purpose of determining his competency, and may call and examine other witnesses touching such question.

7. After the court has determined that a person is competent to testify as a witness, the credibility of the witness immediately becomes a question to be determined by the jury.

8. The action of the trial court in permitting leading questions is largely discretionary, and is properly exercised in the allowance of such questions in the examination of a feeble or simple-minded person.

(Syllabus by the court.)

APPEAL from the District Court of the Second Judicial District for the County of Latah. Hon. Edgar C. Steele, Judge.

The appellant, Milt Simes, was convicted of the crime of rape committed on a female of unsound mind, and sentenced to imprisonment in the state penitentiary for a term of six years. From the judgment and an order denying his motion for a new trial he appealed. *Judgment affirmed.*

William M. Morgan, and Albert L. Morgan, for Appellant.

When the mental deficiency of a witness is brought to the attention of the court, it becomes the duty of the court, of its own motion, to propound questions to the witness tending to determine his qualifications or lack of qualifications to testify. (*People v. Bernal*, 10 Cal. 67, citing *People v. McFarland*, 21 Wend. 609.)

Since the prosecutrix is the only witness who testified to the material facts against the defendant, we are confronted with the proposition that a defendant has been convicted upon the uncorroborated testimony of one who is alleged to be incompetent to be by statute prohibited from testifying.

Argument for Respondent.

The trial court abused the discretion which the law has vested in him in cases of this kind, by permitting the use of leading questions. (*Coon v. People*, 99 Ill. 368, 39 Am. Rep. 28.)

The evidence, even conceding that the prosecutrix was a competent witness, is insufficient upon which to base the verdict and judgment, and the trial judge should have granted a new trial for that reason. His refusal to do so was reversible error. (*State v. Baker*, 6 Idaho, 496, 56 Pac. 81; *State v. Anderson*, 6 Idaho, 706, 59 Pac. 180.)

J. J. Guheen, Attorney General, Edwin Snow and Philip Hindman, for Respondent.

There is nothing arbitrary about a statutory rule in this or any other state prohibiting a witness of unsound mind from testifying. (1 Wigmore on Evidence, secs. 492, 501.)

Statutes providing that persons of unsound mind shall be incompetent (to testify) are generally held merely declaratory, and such persons are excluded in those jurisdictions only when unsound of mind to a degree that would exclude them at common law. (30 Am. & Eng. Ency. of Law, 934, citing *P. & W. Ry. Co. v. Thompson*, 82 Fed. 720, 27 C. C. A. 333; *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. 164; *City of Guthrie v. Shaffer*, 7 Okla. 459, 54 Pac. 698; *Clements v. McGinn* (Cal.), 33 Pac. 920.)

A verdict will not be set aside on the ground that the witness was incompetent, where it appears from the record that he has sufficient capacity to understand the nature and obligation of an oath, and his evidence shows him to be intelligent. (*Wolfforth v. State*, 31 Tex. Cr. 387, 20 S. W. 741; 50 Century Digest, "Witnesses," sec. 99, citing *District of Columbia v. Armes*, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840; *Walker v. State*, 97 Ala. 85, 12 South. 83; *Gore v. State*, 119 Ga. 418, 100 Am. St. Rep. 182, 46 S. E. 671.)

The question of a preliminary examination to test the competency of a witness is entirely discretionary with the trial court. (*Robinson v. Dana*, 16 Vt. 474; *Holcomb v. Holcomb*.

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Conn. 177; *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186; *tsburg & Western Ry. Co. v. Thompson*, 82 Fed. 720, 27 C. A. 333.)

Leading questions will be permitted in the case of witnesses whose weakness of intellect precludes their testifying in the ordinary way. (*People v. Bowers* (Cal.), 18 Pac. 660; 50 Century Digest, "Witnesses," sec. 854, citing *Huffman v. Noble*, 86 Ind. 591; *Brassell v. State*, 91 Ala. 45, 8 South. ; *State v. Bauerkemper*, 95 Iowa, 562, 64 N. W. 609; *Ellis v. State*, 25 Fla. 702, 6 South. 768; *McLean v. City of Lewis*, 8 Idaho, 472, 69 Pac. 478; *Armstead v. State*, 22 Tex. 51, 2 S. W. 627; *Ham v. State* (Tex. Cr. App.), 78 S. 929; *Welsh v. State*, 60 Neb. 101, 82 N. W. 368; *State v. Sins*, 119 Iowa, 663, 94 N. W. 238.)

AILSHIE, J.—The accused in this case was charged by information of the public prosecutor with the crime of rape, that he did, at a time and place designated, "have sexual intercourse with a female not his wife, to wit, one Bessie Jones, being then and there a female not the wife of the said defendant and incapable through lunacy and unsoundness of mind of giving legal consent." Section 6765, Revised statutes, as amended by act of February 7, 1899 (Sess. Laws 1899, p. 167), defines rape as follows: "Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances: Second. Where she is incapable through lunacy, or any other unsoundness of mind, whether temporary or permanent, of giving legal consent."

At the trial the state produced as its first witness the prosecutrix, Bessie Jones, and after she was sworn, the attorney for the defendant called the attention of the court to the fact that the witness about to be examined by the state was the prosecutrix, and that the information charged her with lunacy and unsoundness of mind, and counsel thereupon requested the court "to propound such questions to her as will determine her ability to understand them." To which request the court replied: "The court refuses; you may do so."

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Counsel for defendant replied: "We don't wish to; we except." This action of the court is the principal error assigned. The prosecuting attorney thereupon proceeded to examine the witness and defendant's counsel cross-examined her, from all of which evidence as the same occurs in the record, it is quite clear that the witness, though very simple and childlike, was competent to testify. Section 5957, Revised Statutes, provides that: "The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production," etc.

It is to be observed that the unsoundness of mind required to disqualify such witness must exist "at the time of their production" for the purpose of giving testimony. The statute does not undertake to prescribe or define the amount or degree of mental unsoundness that must exist in order to disqualify the witness, but the reason for the existence of such a statute should be invoked, and we interpret that reason to require that the witness should have some apprehension of the obligation of the oath, and that he shall be capable of giving a fairly correct account of the things he has seen or heard; and this test should be made with special reference to the field of inquiry and character of the subject on which the witness is to give testimony. It would be clearly unfair to test the competency of the witness on the particular subject on which he is insane, when in fact he would not be called upon to testify on that subject, and, indeed, he might be perfectly rational and clear on other subjects. We think, as was said in *Clements v. McGinn*, 33 Pac. 923, that "An insane person is competent to be a witness if he understands the nature of an oath, and has sufficient mental power to give a correct account of what he has seen or heard." (*District of Columbia v. Armes*, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840; 1 Wigmore on Evidence, secs. 492-497; *Wright v. Southern Express Co.*, 80 Fed. 85; *Pittsburg & W. Ry. Co. v. Thompson*, 82 Fed. 720, 27 C. C. A. 333; *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. 164; 2 Elliott on Evidence, secs. 751-759; *City of Guthrie v. Shaffer*, 7 Okla. 459, 54 Pac. 698; *Walker v. State*, 97 Ala. 85, 12 South. 83; Underhill on Crim-

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al Evidence, secs. 202, 203, 30 Am. & Eng. Ency. of Law, ed., 934.) For a learned and interesting case stating the modern English rule, see *Regina v. Hill*, 5 Cox C. C. 259; S. 2 Den. & P. 254.

This brings us to the question as to whether or not the fact that the state charges by the information that the female whom the offense was committed was, at the time, incapable of giving legal consent, by reason of unsoundness of mind, itself, disqualifies her as a witness or raises the presumption that she is incompetent to testify. Since no conviction can be had without the state establishing beyond a reasonable doubt that the female was of unsound mind at the time of the commission of the alleged offense and every presumption must be resolved in favor of the accused until overcome by legal and competent evidence, it would seem to follow as a logical conclusion that the prosecutrix, when produced as a witness should, in the eye of the law, stand on the same footing as any other witness, sharing the same credit for sanity and competency as is *prima facie* accredited to persons. The defendant in such case, if he is going to enter a plea of not guilty and stand trial, must thereupon proceed upon the presumption which the law accredits him. He cannot go to trial on the plea that he is innocent, and at the moment the state produces a witness against him interpose an objection based upon the theory that the state has already established by its pleading one of the material and essential facts against him. When a witness is produced, it is a right and privilege accorded to the adverse party to subject to the examination of such witness upon the ground of incompetency to testify. The question of competency is largely one of law, and must be determined by the court. Rev. Stats., sec. 7883; Wigmore on Evidence, sec. 497; Elliott on Evidence, sec. 753; Underhill on Criminal Evidence, sec. 203; *Cannady v. Lynch*, *supra*; *Holcomb v. Holcomb*, 28 Conn. 177.) There is no fixed or established rule for determining such question. It seems, however, to be the usual practice, and, we think, the proper and orderly way to proceed, for the court to examine the witness for the

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purpose of ascertaining his condition of mind and ability to truthfully and correctly narrate the facts concerning which he is called to testify; and, in the determination of this fact, it may often be found proper and necessary to call other witnesses to testify. After the court has determined that the witness offered is competent to testify, the question of his credibility immediately becomes a matter for the consideration and determination of the jury. The mental condition of a witness as manifested by him on the witness-stand almost invariably influences the jury as to the weight they will give his testimony. The manner in which a witness tells his story; the advantages he appears to have had for gaining accurate information on the subject, the accuracy and retentiveness of his memory; his capacity for consecutive narration of acts and events; his apparent frankness and intelligence, and numerous other considerations—all go to make up the sum total of credibility that the jury will give to the evidence of any particular witness. It should be borne in mind, too, that the mental capacity of the female to give her consent to the act for which the defendant is prosecuted is a question of fact for the jury to determine along with all the other questions of fact submitted to them by the evidence. Counsel for appellant argues, however, that if the prosecutrix was so weak-minded and mentally unsound as to render her incapable of giving an intelligent assent to the violation of her person, she must have been, for the same reason, incapable of giving competent testimony concerning the commission of that act. While there is apparent reason for such an assumption, and in many cases it would undoubtedly be true, we do not think the position tenable as a rule nor that the latter conclusion necessarily follows the existence of the former fact. It would seem that a female, although of mature years, and fully developed physically, might be so far insane and mentally deranged as not to realize or appreciate the impropriety or effect of the illicit act, and still might be capable of giving a substantially correct and truthful statement of the occurrence and conditions under which it took place. Incapacity to give intelligent and legal con-

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sent to an act does not necessarily imply incapacity to thereafter correctly narrate the facts constituting the commission of the act. Counsel for appellant cite *Lee v. State*, 43 Tex. Cr. App. 285, 64 S. W. 1047, as authority for their position, but an examination of that case at once discloses the fact that it is based on a statute materially different from ours. The Texas statute under consideration in that case provided that no one could testify who was in an "insane condition of mind when the events happened of which they are to testify."

Where timely objection is made to a witness testifying on the grounds of incompetency, it is unquestionably the duty of the court to make such examination as will satisfy him as to the competency or incompetency of the witness to testify in the case and thereupon to rule on the objection accordingly. In this case the court refused to do so, but allowed the witness to testify, which act amounted to a ruling that the witness was competent. While the defendant was entitled to have his objection examined into and passed upon by the court, it is apparent to us that he has suffered no injury or loss of right on account of the action of the court (*Wright v. Southern Express Co.*, *supra*), for the reason that the record discloses such facts as convince us that the witness was competent to testify. The credibility of the witness was properly left to the jury, and has been determined by them. The prosecutrix was corroborated in several material respects. It was shown that she was an unmarried woman; pregnancy and parturition were established as well as the defendant's acquaintance and somewhat intimate association with her. It is also shown that both before and after his arrest he had made the statement that he was willing to marry her. Other damaging statements were also shown.

Appellant complains of the action of the trial court in permitting the prosecutor to examine the witness, Bessie Jones, by leading questions. There was no error in permitting leading questions asked this witness. In *McLean v. City of Lewiston*, 8 Idaho, 472, 69 Pac. 478; this court held that the allowance of such questions was a matter addressed to

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the sound discretion of the court, and unless abused, would not afford grounds for reversal. And there are particular and peculiar cases, of which this is one, where the exception to the general rule is essential and is necessarily invoked. (See discussion and note in 1 Wigmore on Evidence, secs. 769-779.)

We think the judgment in this case should be affirmed, and it is so ordered.

Stockslager, C. J., and Sullivan, J., concur.

(May 14, 1906.)

W. R. TRULL, Respondent, v. MODERN WOODMEN OF AMERICA, Appellant.

[85 Pac. 1081.]

APPEAL—ORDER DENYING NEW TRIAL—TESTIMONY OF PHYSICIAN—PRIVILEGED COMMUNICATION—WAIVER OF PRIVILEGE—TIME OF WAIVER—CROSS-EXAMINATION OF EXPERTS.

1. Where an appeal is taken from an order denying a motion for a new trial at a period of more than sixty days after the order is made and entered, such appeal is ineffectual and will be dismissed on motion of the adverse party.

2. Where the appeal from the judgment was not taken within sixty days after the rendition of the judgment, and no valid appeal has been taken from the order denying a motion for a new trial, the appellate court is without authority or jurisdiction to examine the evidence for the purpose of ascertaining whether or not it is sufficient to support the verdict and judgment.

3. Where in an application for life insurance the applicant stipulates and agrees that he waives all provisions of law preventing a physician from testifying as to any information acquired by him while attending his patient or rendering him incompetent as a witness as provided in section 5958, Revised Statutes, such waiver is valid, and entitles the beneficiary named in the policy, as well as the insurer, in an action upon a policy issued on such application, to call and examine the physician who attended the insured

Argument for Appellant.

during his last sickness and have him answer questions which, but for such waiver would be regarded as privileged communications that the witness could not disclose.

4. Since the statute, section 5958, subdivision 4, Revised Statutes, authorizes the patient to waive the privilege of secrecy imposed on his physician, and does not fix any specific time at which such waiver can or must be made, no reason is discovered why the waiver may not equally as well be made by contract and in advance of the relation of physician and patient arising as at the time of the trial.

5. As to whether or not the privilege of secrecy granted by statute is a personal privilege attaching only to the person of the patient, or can be waived by his heir or legal representative, *quaere*.

6. The courts will be liberal in allowing a broad range of inquiry on cross-examination, and this rule is especially and peculiarly applicable when it comes to the cross-examination of that class of witnesses commonly called experts.

(Syllabus by the court.)

APPEAL from the District Court of the Second Judicial District for the County of Latah. Hon. Edgar C. Steele, Judge.

Action by W. R. Trull, the beneficiary named in a benefit certificate issued by the Modern Woodmen of America on the life of John B. Trull, to recover the sum of \$2,000, the amount for which the certificate was issued. Verdict and judgment for the plaintiff, and defendant moved for a new trial. New trial denied and the defendant appealed from the judgment and order denying a new trial. Appeal from the order denying a new trial dismissed. *Judgment affirmed.*

T. W. Bartley and S. S. Denning, for Appellant.

The patient alone can waive the secrecy of the privileged communications, and when such patient is dead, the matter is forever closed. (*In re Nelson's Estate*, 132 Cal. 182, 64 Pac. 294; *In re Redfield's Estate*, 116 Cal. 637, 48 Pac. 794; *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019; *Life Ins. Co. v. Trust Co.*, 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119; *Grattan v. Ins. Co.*, 80 N. Y. 281, 36 Am. Rep. 617, 92 N. Y. 274, 44 Am. Rep. 372; *Pearson v. People*, 79

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N. Y. 424, 35 Am. Rep. 524; *Eddington v. Life Ins. Co.*, 67 N. Y. 185; *Westover v. Life Ins. Co.*, 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104; *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320; *Loeder v. Whelpley*, 111 N. Y. 239, 8 N. E. 874; *Freel v. Market St. Ry. Co.*, 97 Cal. 40, 31 Pac. 730.)

A hypothetical question propounded to an expert witness must be based upon the facts proven or admitted in the case. (*Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45.)

Forney & Moore, for Respondent.

Under subdivision 3, section 4807, Revised Statutes, the appeal from the order granting or refusing a new trial must be taken within sixty days after the order is entered on the minutes of the court, or filed with the clerk. (*Moe v. Harger*, 10 Idaho, 194, 77 Pac. 645; *Cunningham v. Stoner*, 10 Idaho, 549, 79 Pac. 228.)

That the verdict is against the law, and that the judgment is against law, are matters which cannot be reviewed by this court at this time. (*Young v. Tiner*, 4 Idaho, 275, 38 Pac. 697; *Brumagim v. Bradshaw*, 39 Cal. 24.)

If the patient himself waives the privilege by a clause contained in the contract, that waiver is binding on anyone who claims under the contract, whether it be the patient himself or his representatives. (*Adreveno v. Mutual etc. Assn.*, 34 Fed. 870; *Foley v. Royal Arcanum*, 151 N. Y. 196, 56 Am. St. Rep. 621, 45 N. E. 456; *Alberti v. Railroad Co.*, 118 N. Y. 77, 85, 23 N. E. 35; *Roseau v. Bleau*, 131 N. Y. 177, 184, 27 Am. St. Rep. 578, 30 N. E. 52.)

A cross-examination of a party or of an expert should be allowed a liberal range, touching all matters testified to in chief, or tending to test the temper, motives, intelligence, accuracy, capability or means of knowledge of the witness. (*People v. Foley*, 64 Mich. 148, 31 N. W. 596; *Dillebar v. Life Ins. Co.*, 87 N. Y. 79; *McFadden v. Railway Co.*, 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; *McLean v. City of Lewiston*, 8 Idaho, 472, 69 Pac. 478.)

AILSHIE, J.—This is an appeal from a judgment and an order denying a motion for a new trial. The respondent has submitted a motion to dismiss the appeal from the order denying the defendant a new trial on the ground that the appeal was not taken within sixty days after the entry of the order as required by subdivision 3 of section 4807, Revised Statutes. The order denying a new trial was made and entered on the ninth day of October, 1905, and the appeal therefrom was not taken until the thirteenth day of March, 1906. Since the appeal from the order denying appellant's motion for a new trial was not taken within the time prescribed by the statute, it is ineffectual and must be dismissed, and it is so ordered. (*Moe v. Harger*, 10 Idaho, 194, 77 Pac. 645; *Cunningham v. Stoner*, 10 Idaho, 549, 79 Pac. 228.)

The judgment in this case was entered on the twenty-sixth day of May, 1905, but the appeal was not taken until March 13, 1906. The appeal from the judgment having been taken after a period of more than sixty days had elapsed from the rendition of the judgment and there being no appeal from the order overruling the motion for a new trial, we have no authority to examine the evidence for the purpose of determining its sufficiency to support the verdict nor for any other purpose except to determine whether or not errors of law were committed by the court in the course of the trial. Counsel for appellant have argued that since they moved for a new trial on the grounds that the verdict and judgment are both "against the law," this court should examine the evidence for the purpose of determining whether or not the jury brought in a verdict in accordance with the instructions given by the court. That contention is fully answered in *Young v. Tiner*, 4 Idaho, 269, 38 Pac. 679, where this court says: "It is also contended by respondent that the second error assigned, to wit, 'that the verdict is against law,' cannot be considered, for the reason that it is 'not in proper form.' The appellant specifies and avers, in his statement on motion for a new trial, 'that the verdict is against law,

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as applied to the facts proven in the case,' and proceeds to support that averment by undertaking to show that the verdict is not supported by all of the facts proved by the evidence. This is simply another manner (under a different name) of showing that the evidence is insufficient to sustain the verdict, which cannot be done on this appeal. This court has no authority on this appeal to review all of the evidence to ascertain the facts proved, in order to determine whether the verdict 'is against law' when applied to such facts. This would simply be reviewing the evidence to ascertain whether it was sufficient to sustain the verdict, which is not permissible on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition thereof."

As the case is here only on appeal from the judgment, we are bound to confine our inquiries to the alleged errors of law.

This action was instituted to recover the sum of \$2,000 claimed to be due the respondent as the beneficiary named in a benefit certificate issued by the appellant, Modern Woodmen of America, to one John B. Trull, now deceased. The only issue that was involved in the case in the trial court was as to whether or not the insured died of smallpox. The application for insurance contained a specific and express waiver of the right of recovery in case the insured should die of smallpox or varioloid. The company alleged that the insured died of smallpox, while the respondent, on the other hand, who is the beneficiary named in the certificate, contended that death resulted from erythema and impetigo.

The first and principal question presented is as to the ruling of the court in permitting Dr. Taylor, who attended the insured during his last sickness, to testify as to the condition of the patient and what he learned from the patient in diagnosing the case. After the witness had testified at some length as to his visit and the condition in which he found the patient, he said: "I asked the man a question, what he had been taking, and he said he had been taking poison oak." Here counsel for appellant interposed: "We object to that, may it please the court, as not being competent testi-

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mony, conversation that he had." The court replied: "It is part of the diagnosis," to which counsel for respondent replied: "Something we have no way of disputing." Thereupon the witness continued: "To make my diagnosis clear and to find out, I asked this man what he had been taking, and he tells me he had been taking poison oak, and I asked him who prescribed this, and he told me a man by the name of Dr. Fry had prescribed this and gave it to him. I changed the prescription and that is all that was said or done, only prescribing to him." Section 5958, Revised Statutes, contains the following provision: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

4. A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient."

This provision of our statute is to be found in the statutes of many of the states, and especially in California, New York and Missouri. It has been quite uniformly held that such a statutory provision disqualifies a physician from testifying concerning any facts learned by him or disclosures made to him in the course of his professional treatment of or attendance on a patient. (*Freel v. Market St. Ry. Co.*, 97 Cal. 40, 31 Pac. 730; *In re Flint*, 100 Cal. 394, 34 Pac. 863; *Streeter v. City of Breckinridge*, 23 Mo. App. 244; *Westover v. Aetna Life Ins. Co.*, 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104; *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320.)

It has also been held that the privilege accorded the patient by such a statute is a personal privilege, and cannot be waived for him by any other person, and that the death of the patient makes a waiver impossible, and that the physician can never thereafter be permitted to testify concerning any matter touching his professional employment during the life of the patient. (*Westover v. Aetna Life Ins. Co.*, *supra*; *Freel v. Market St. Ry. Co.*, *supra*.) On this point, however,

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there is great diversity of opinion. (See *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510, and note on page 570.)

Counsel for respondent urge that since the statute specifically provides that this privilege of secrecy may be waived by the patient, and since the statute does not specify any particular time at which the waiver shall be made, it may be as effectually done by reason of a specific stipulation in the contract as at the time of the trial. The insured in this case was required to sign a written agreement and application for insurance, in which the following clause is contained: "And I hereby expressly waive for myself and beneficiaries the privilege or benefits of any and all laws which are now or may be hereafter enforced, making incompetent the testimony of or disqualifying any physician from testifying concerning any information obtained by him in a professional capacity." Respondent relies on the effect of this stipulation for a justification of the admission of the evidence of the attending physician. The effect of such a stipulation or waiver appears to have been considered by some of the courts in states having statutes similar to ours relative to privileged communications. We will briefly revert to a few of these authorities: In *Re Adreveno v. Mutual Reserve Fund Life Assn.*, 34 Fed. 870, the beneficiary had sued upon a life insurance policy, and it appeared that the application for the policy had contained a stipulation very similar to the stipulation in this case. The insurance company offered one of the attending physicians as a witness to prove that the insured had made false representations as to his physical condition and ailments, and upon the admission of such testimony, Judge Thayer said: "As the patient is at liberty to waive the privilege which the law affords him, it appears to me it is immaterial whether the patient waives the privilege by calling the physician to testify in his behalf, or whether he waives it, as in this case, by a clause contained in the contract on which the suit is brought; and if the patient himself waives the privilege by a clause contained in the contract, that waiver, in my judgment, is binding on anyone who

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claims under the contract, whether it be the patient himself or his representative. The result is that, inasmuch as the assured by this application waived the privilege which the statute affords him, the father, for whose benefit the policy was issued, and who is now suing on the contract, is bound by that waiver. I therefore hold that the testimony is admissible."

Foley v. Royal Arcanum, 151 N. Y. 196, 56 Am. St. Rep. 621, 45 N. E. 456, was an action on a mutual benefit certificate, where the application for the insurance had contained a stipulation waiving the privilege of secrecy imposed by statute on the attending physician. At the time the contract was made the New York Code of Civil Procedure, sections 834 and 836, appear to have been substantially the same as our statute, but after the making of the contract and prior to the commencement of the action on the benefit certificate, the legislature so amended the statute as to require the waiver to be made at the time of trial. The supreme court of New York in that case sustained the stipulation of waiver and permitted the witness to testify, quoting at length from the opinion of Judge Thayer in *Adreveno v. Mutual Reserve Fund Life Assn.*, *supra*. The court, in concluding that opinion, said: "It appears to us that these cases disposed of the question under consideration, that the waiver is not in contravention of any principle of public policy, and that the amendment to section 836 of the code, made after the contract, has no application."

In the *Matter of Coleman*, 111 N. Y. 220, 19 N. E. 71, a firm of attorneys, Hughs & Northup, had been employed to prepare a will. After it had been drafted and submitted to the testator, he requested both members of the firm to sign and attest the same as witnesses thereto. Upon the probate of the will the question arose as to the competency of the attorneys to testify concerning the mental capacity of the testator at the time he executed the will. In considering the effect of the New York statute (Code Civ. Proc., sec. 836), and the privilege granted thereby to communications made in the course of professional employment and

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the right of the client to waive the privilege, the court said: "There is nothing in this section requiring the waiver to be made in writing, or in any particular form or manner, or at any particular time or place; but it is required to be an express waiver, and made in such manner as to show that the testator intended to exempt the witness, in the particular instance, from the prohibition imposed by statute. . . . It cannot be doubted that, if a client in his lifetime should call his attorney as a witness in a legal proceeding, to testify to transactions taking place between himself and his attorney, while occupying the relation of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the statute, and can it be any less so when the client has left written and oral evidence of his desire that his attorney should testify to facts, learned through their professional relations upon a judicial proceeding to take place after his death? We think not. (*McKinney v. Grand St. etc. R. R. Co.*, 104 N. Y. 352, 10 N. E. 544.) The act of the testator, in requesting his attorneys to become witnesses to his will, leaves no doubt as to his intention thereby to exempt them from the operation of the statute, and leave them free to perform the duties of the office assigned them, unrestrained by an objection which he had power to remove." (To the same effect see *Alberti v. Railroad Co.*, 118 N. Y. 77, 23 N. E. 35; *Rosseau v. Bleau*, 131 N. Y. 177, 27 Am. St. Rep. 578, 30 N. E. 52.)

In the light of the foregoing authorities and with the understanding we gather as to the intention and purpose of the statute, we see no reason why the court should not give force and effect to the clause in the contract making the attending physician competent to testify in all matters the same as other witnesses. In that view of the case there could be no question but that the testimony of Dr. Taylor was properly admitted. The benefits of the waiver are equally as available to the beneficiary as to the insurer.

Appellant's sixth assignment of error is that the court erred in sustaining plaintiff's objection to the following question asked Dr. Taylor: "Q. At the time you understood

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that, did you have any understanding as to whether Dr. Magee occupied any official position in Shoshone county?" It seems that Dr. Magee was the health officer of Shoshone county, and as such had established a quarantine over the house where Trull resided, and that Taylor knew of this fact. The defendant was, by the question propounded to the witness, endeavoring to show the jury that the doctor knew of the quarantine having been established by the proper health officer, and that it had been established on account of the health officer believing the disease to be smallpox. The question was undoubtedly a proper one and should have been answered. But the refusal of the court to permit the answer evidently did not prejudice the defendant. It fully and clearly appears from the testimony of the witness Taylor that he did in fact know that Magee was the health officer of the county, and that he also knew of the quarantine and the reasons that had been assigned for the same. That fact runs all through the record and is testified to by Dr. Magee. The jury had all the information on this point, and if the witness had answered the question it would only have amounted to at most a repetition of the evidence on that point.

Appellant's seventh assignment of error relates to the ruling of the court in permitting the witness, Dr. Adair, to answer the following question on cross-examination: "If a man died of the disease supposed to be smallpox, and the man who nursed him all that time had never been vaccinated, and did not take the smallpox at all from the patient, would you think it smallpox?" The principal objection urged by appellant to this hypothetical question is that it was not based upon the facts proven in the case. There was some evidence in the case that would justify a hypothetical question of the foregoing character, and bring it within the rule announced in *Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45, and *McLean v. City of Lewiston*, 8 Idaho, 472, 69 Pac. 478. The rule is quite liberal in allowing a broad range of inquiry on cross-examination, and this rule is especially and particularly applicable when it comes to the cross-examination of that class of witnesses commonly called experts.

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The eighth assignment is without merit, and requires no consideration here.

Appellant's last assignment of error is directed to the action of the court in permitting the witness Dr. Taylor to answer the following question: "Didn't he tell you that he wanted this to settle up the matter?" The witness at the time this question was asked was defendant's witness and the question was asked by plaintiff's attorney on cross-examination. He was testifying concerning a statement or proof which he had signed and delivered to the agent of the defendant company as a part of the death proof. This statement differed somewhat from the previous statement or certificate which the witness had signed as to the nature of the disease of which the insured died. The witness was testifying as to the statement made to him by defendant's agent, and the facts and circumstances under which the additional certificate was signed; and the reasons therefor. Taking into consideration the other facts appearing from the record, we do not think there was any error in permitting the answer to this question.

As previously stated, we have no authority or jurisdiction to examine the evidence in this case for the purpose of determining whether or not, as a matter of fact, it was sufficient to justify the jury in concluding that the insured did not die of smallpox. As to the questions of law presented, we do not think any error has been committed that would justify this court in reversing the judgment. The judgment is affirmed, with costs in favor of respondent.

Stockslager, C. J., and Sullivan, J., concur.

Argument for Appellants.

(May 24, 1906.)

M. J. SHIELDS, Plaintiff and Respondent, v. FRANK M. JOHNSON and FRANK FRAZIER, Defendants and Appellants.

[85 Pac. 972.]

MOTION FOR NONSUIT SHOULD BE SUSTAINED WHEN—WHEN MOTION FOR A NONSUIT IS WAIVED.

1. If it is shown by the record that the demand for damages should, under the statute, have been litigated in a former action between the same parties, a motion for a nonsuit on that ground should be sustained.

2. Where it is shown that a motion for a nonsuit is interposed at the close of plaintiff's evidence on the ground that the subject matter of the action could have been litigated in a former suit, between the same parties, and after such motion is denied the defendant submits evidence in support of his defense, he waives his motion for a nonsuit, and must accept the verdict of the jury, unless he renews such motion at the close of all the evidence.

(Syllabus by the court.)

APPEAL from the District Court of the Second Judicial District for Latah County. Hon. Edgar C. Steele, Judge.

Plaintiff sues for damages and verdict rendered in his favor. Defendant appeals from the order overruling a motion for a nonsuit and the judgment. *Judgment affirmed.*

George S. Pickett and S. S. Denning, for Appellants.

A party will not be permitted to bring his action to quiet title against a defendant and allege damages, then upon the trial of the cause dismiss his damage, and immediately thereafter file another action for damages and injunction. As the former case is *res adjudicata*, the party will be estopped from bringing a second cause of action in any matter that could be litigated in the former action. (*Murphy v. Russell*, 8 Idaho, 151, 67 Pac. 427; *Bean v. Givens*, 5 Idaho, 774, 51 Pac. 987;

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Stevens v. Home etc. Assn., 5 Idaho, 741, 51 Pac. 779, 986; *Chemung Min. Co. v. Hanley*, 11 Idaho, 302, 81 Pac. 619; *Hanley v. Beatty*, 117 Fed. 59, 54 C. C. A. 445; *Empire State etc. Min. Co. v. Hanley*, 136 Fed. 99, 69 C. C. A. 87; *Shields v. Johnson*, 10 Idaho, 476, 79 Pac. 391.)

The defendant, although he takes the chance of aiding the plaintiff's cause by putting in his own evidence, does not waive his objection to the action of the court, in overruling the demurrer to plaintiff's evidence. (*Weber v. Kansas City Cable R. R. Co.*, 100 Mo. 194, 18 Am. St. Rep. 541, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819; *Alpers v. Hunt*, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846, 9 L. R. A. 483; *Vinson v. Los Angeles Pac. R. R. Co.*, 147 Cal. 479, 82 Pac. 53.)

Forney & Moore, for Respondent.

Motion for nonsuit on account of insufficiency of evidence is waived by the subsequent introduction of testimony by the mover. (*Chamberlain v. Wooden*, 2 Idaho, 644, 23 Pac. 177; *Bradley v. Poole*, 98 Mass. 169, 93 Am. Dec. 144; *Railway Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; *Insurance Co. v. Crandall*, 120 U. S. 530, 30 L. ed. 740, 7 Sup. Ct. Rep. 685; *Bogk v. Gassell*, 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. Rep. 738; *Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321; *Union Ins. Co. v. Smith*, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. Rep. 534; *Columbia & P. S. Ry. Co. v. Hawthorne*, 144 U. S. 202, 36 L. ed. 405, 12 Sup. Ct. Rep. 591.)

STOCKSLAGER, C. J.—For a statement of the entire history of this case and some of the facts important here, see *Shields v. Johnson*, 10 Idaho, 476, 79 Pac. 391; also, 10 Idaho, 454, 79 Pac. 394. It will be observed by a reference to these two decisions that the parties to this litigation have not been idle so far as the courts are concerned since their first business acquaintance out of which the cause now before us has ripened. It is correctly stated by learned counsel for appellants that the first action was commenced in the district court of Latah county on the twenty-fourth day of April, 1904, by respondent

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as plaintiff and against appellants as defendants, to quiet title to certain real estate described in his complaint, and in addition to his demand that the title and right of possession of such real estate be quieted in him, that he have damages in the sum of \$500 against the defendants, and each of them, as a second cause of action. It is shown by the record in *Shields v. Johnson, supra*, that at the time of the trial the question of damages was waived by plaintiff with the consent of defendants, and all allegations in the complaint as to damages were eliminated therefrom. It seems the case was tried on the third day of August, 1904. On the eighteenth day of July, 1904, respondent commenced this action alleging damages in the sum of \$2,000. The fourth allegation is: "That during the summer season of 1904 there was growing upon said lands and premises one hundred and twenty acres of tame grass known as *Bromus Innermis*, and also forty acres of alfalfa, which the plaintiff had theretofore at great cost and expense sown upon said premises for the purpose of harvesting the same for seed, and that said crop of grass so grown upon said premises was valuable for seed." The fifth allegation is: "That about March or April, A. D. 1904, while this plaintiff was entitled to the possession, and was in the possession of said premises, the said defendants went thereon and plowed up about fifty acres of said land sown with *Bromus Innermis* as above set forth, and sowed thereon a crop of oats, and also plowed up the forty acres of land sown to alfalfa, all of which acts and things were done without the knowledge or consent of this plaintiff."

The sixth allegation is: "That on or about July 11, 1904, without plaintiff's knowledge or consent, the said defendants entered upon said premises and cut down about forty acres of said grass sown as above alleged, by this plaintiff, and known as *Bromus Innermis*. That all the acts and things done by the said defendants as above set forth were done without the knowledge or consent of this plaintiff, and by said acts upon the part of the said defendants this plaintiff has been damaged in the sum of \$2,000." Then follows

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an allegation of the insolvency of the defendants; that they are unable to respond in damages, and unless enjoined and restrained, will cut and remove the balance of the Bromus Innermis and otherwise damage plaintiff. The prayer of the complaint is that plaintiff have judgment for \$2,000 damages; that defendants be restrained and enjoined from further acts of waste and for costs.

Appellants applied to the court for an order dissolving the temporary restraining order issued by the court on the complaint and prayer of plaintiff. The application was denied and an appeal from the order was prosecuted in this court and the action of the lower court affirmed. (*Shields v. Johnson*, 10 Idaho, 454, 79 Pac. 394.)

In May, 1905, the question of damages was tried and the jury returned a verdict in favor of the plaintiff for the sum of \$275, for which amount judgment was entered in favor of the plaintiff. At the close of plaintiff's evidence appellant's counsel made the following motion: "Comes now the defendant and moves the court to peremptorily instruct the jury to bring in a verdict for the defendant, or to order a nonsuit upon the ground that the evidence of the plaintiff himself shows that he is estopped from maintaining this action." This motion was overruled, which ruling is assigned as error, and the only assignment in the record. Counsel for appellants in their brief say: "Can a party bring an action to quiet title with one of his causes of action alleging \$500 damages for trespass and wrongful holding, and then before the action is tried dismiss his right to damages and immediately turn round and file another action claiming damages and injunction?" An answer to this question disposes of this case, as it is the only question brought here for consideration, unless the contention of counsel for respondent that when appellant introduced his evidence after the court had denied their motion for nonsuit, they thereby waived their motion; or that the motion of appellants is too indefinite and uncertain, not specifying wherein and by what acts the respondent was estopped from maintaining his action, shall be

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accepted as the law of this case. The law does not encourage a multiplicity of suits. Subdivision 1 of section 4184, Revised Statutes, referring to a counterclaim, provides: "A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." We do not understand from respondent's brief that he questions the requirements of this statute. It has been construed a number of times by this court. (*Bean v. Givens*, 5 Idaho, 774, 51 Pac. 987; *Stevens v. Home Savings & Loan Assn.*, 5 Idaho, 741, 51 Pac. 779, 986; *Murphy v. Russell*, 8 Idaho, 151, 67 Pac. 427.) If the cause of action for damages existed at the time the plaintiff commenced his original suit, the statute required him to plead it, and when he dismissed his second cause of action alleging \$500 damages for waste, he is estopped from again pleading that element of damage or any other damages that may have existed at the time he commenced his action, and if such facts are shown by the record, the motion for nonsuit should have been sustained, unless appellant waived his motion for nonsuit by offering proof in support of the defense shown by his answer, or unless it is shown by the record that the elements of damage alleged in the complaint were sustained by plaintiff after he filed his original complaint.

From the record in this case the important and controlling question is dependent on the force and effect of respondent's contention that "when appellant introduced his evidence after his motion for nonsuit was overruled, he waived all his statutory rights given him on such motion."

Section 4354 says: "An action may be dismissed or a judgment of nonsuit entered in the following cases: . . . Subdivision 5. By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury."

In *Chamberlain v. Woodin*, 2 Idaho, 642, 23 Pac. 177, Mr. Justice Beatty, speaking for the court, said: "Motion for nonsuit on account of insufficiency of evidence is waived by the subsequent introduction of testimony by the mover. Did

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the court err in overruling the motion for nonsuit? The motion, as above stated, was based upon the alleged insufficiency of the evidence. In the determination of this question, examination of the testimony is unnecessary, for any error the court may have made in this matter was entirely waived by the subsequent introduction of appellants' testimony. It is so settled by the highest authority, to which, for the justification of our ruling, we refer." Whilst the court in this opinion, which was unanimous, does not directly refer to the statute above quoted as one of the reasons for the conclusion reached, we assume it was construed in connection with the United States authorities cited, to wit: *Bradley v. Poole*, 98 Mass. 179, 93 Am. Dec. 144; *Railway Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; *Insurance Co. v. Crandall*, 120 U. S. 530, 30 L. ed. 740, 7 Sup. Ct. Rep. 685.

Section 242, Compiled Statutes of Montana, is in the same language as our subdivision 5, section 4354. This section was construed by the supreme court of Montana and thereafter by the supreme court of the United States in *Boyk v. Gasert*, 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. Rep. 738. Mr. Justice Brown delivered the opinion, and at page 23 he says: "The practice of Montana (Comp. Stats., sec. 242) permits a judgment of nonsuit to be entered 'by the court upon motion of the defendant when, upon the trial the plaintiff fails to prove a sufficient case for the jury.' Without going into the question whether the motion was properly made in this case, it is sufficient to say that defendant waived it by putting in his testimony. A defendant has an undoubted right to stand upon his motion for a nonsuit, and have his writ of error, if it be refused; but he has no right to insist upon his exception after having subsequently put in his testimony and made his case upon the merits, since the court and jury have the right to consider the whole case as made by the testimony. It not infrequently happens that the defendant himself, by his own evidence, supplies the missing link, and if not, he may move to take the case from the jury upon the conclusion of the entire evidence." In addition to the cases

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cited by Mr. Justice Beatty in *Chamberlain v. Woodin*, *supra*, Mr. Justice Brown cites *Northern Pac. Ry. Co. v. Mares*, 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321; *Union Ins. Co. v. Smith*, 124 U. S. 405-425, 31 L. ed. 497-505, 8 Sup. Ct. Rep. 534; *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 36 L. ed. 405, 12 Sup. Ct. Rep. 591. Our attention is not called to any authority in conflict with the rule as above announced, the reasons for which are so clearly stated in the quotation from *Boyk v. Gassert*, *supra*.

Again, the record does not inform us what evidence was submitted to the jury by defendants nor what was shown by plaintiff on rebuttal; hence not a complete record of all the proceedings or all the facts submitted to the jury upon which they returned a verdict in favor of plaintiff. If the defendant had refused to offer any evidence after his motion for nonsuit was denied, the record would be complete; but as stated by Mr. Justice Brown above quoted, the defendant by his own evidence may have "supplied the missing link," and thus aided the jury in finding against him. The rule that defendant may introduce evidence after his motion for nonsuit has been denied, and, after the introduction of any rebuttal evidence offered by plaintiff, renew his motion and bring the entire record up for review, has support in the authorities above cited. If we should review the evidence disclosed by this record with a view of reversing the judgment, it would not only be unfair to the jury but the trial court as well, as they had the benefit of all the evidence in the case, and we only have that part of it offered by the plaintiff in chief. The judgment is affirmed with costs to respondent.

Ailshie, J., and Sullivan, J., concur.

ON PETITION FOR REHEARING.

(July 7, 1906.)

SULLIVAN, J.—A petition for a rehearing has been filed in this case, and after a careful examination of the same, the

Points Decided.

court finds no reason why a rehearing should be granted. A rehearing is therefore denied.

Stockslager, C. J., and Ailshie, J., concur.

(May 31, 1906.)

STATE, Respondent, v. THOMAS J. MCGINNIS, Appellant.

[85 Pac. 1089.]

CRIMINAL LAW—ABSENCE OF ACCUSED DURING PART OF TRIAL—VIEW OF PLACE WHERE OFFENSE WAS COMMITTED—CRIMINAL NEGLIGENCE—SUFFICIENCY OF EVIDENCE—PREJUDICIAL STATEMENTS BY WITNESS.

1. While section 7782, Revised Statutes, which provides that: "If the indictment is for a felony, the defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of the defendant," is mandatory; a brief, temporary and voluntary absence of the defendant from the courtroom during the argument by counsel and ruling by the court on a motion to have the jury view the place where the offense was committed is not such a violation of the statute and invasion of such a substantial right of the accused as will cause a reversal of a judgment of conviction which is otherwise regular.

2. In a case where the court orders the jury to view the place where it is alleged that the offense was committed, it is error for the court to deny the defendant the right to be present at such inspection if he requests in person or by counsel the privilege of being present.

3. As to whether or not a defendant may waive the right of being present at a view of the place by the jury, *quære*. *State v. Reed*, 3 Idaho, 754, 35 Pac. 706, criticised and soundness of rule questioned.

4. Evidence examined in this case and held that it establishes such a state of culpable and criminal negligence or recklessness and disregard for the safety of human life as to support a verdict of manslaughter.

5. Certain incompetent and inadmissible statements made by the witness that are disallowed and ruled out by the court, and the

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jury admonished not to consider, and which are repeated by the witness and the same action taken thereon by the court, reviewed, and held, that although reprehensible on the part of the witness, they are not sufficient grounds for a reversal of the judgment.

(Syllabus by the court.)

APPEAL from the District Court of the Third Judicial District for Ada County. Hon. George H. Stewart, Judge.

Appellant was prosecuted on information by the county attorney, charged with the crime of manslaughter and was convicted as charged. He moved for a new trial and his motion was denied, and he thereafter appealed from the judgment and order. *Affirmed.*

T. D. Cahalan, Frank Martin and C. F. Koelsch, for Appellant.

The defendant not only has the right to be present at every stage of his trial, but he *must* be present—it is a right which he cannot waive. (Cooley on Constitutional Limitations, sec. 319; Clark's Criminal Procedure, sec. 148; *State v. Jenkins*, 84 N. C. 812, 37 Am. Rep. 643; *People v. Kohler*, 5 Cal. 72; *People v. Higgins*, 59 Cal. 357; *Gladden v. State*, 12 Fla. 562; *Smith v. People*, 8 Colo. 457, 8 Pac. 920; *Jackson v. Commonwealth*, 19 Gratt. (Va.) 656; *Adams v. State*, 28 Fla. 511, 10 South. 106; *Rolls v. State*, 52 Miss. 391; *State v. Smith*, 44 Kan. 75, 21 Am. St. Rep. 266, 24 Pac. 84, 8 L. R. A. 774; *Lovett v. State*, 29 Fla. 356, 11 South. 172; *Bearden v. State*, 44 Ark. 331; *State v. Schoenwald*, 31 Mo. 147; *Andrews v. State*, 34 Tenn. (2 Sneed) 550; *Younger v. State*, 2 W. Va. 579, 98 Am. Dec. 791.)

The improper statements of the witness Packenham on the witness-stand were highly prejudicial to the defendant and calculated to bias the minds of the jury against him. (*State v. Irwin*, 9 Idaho, 35, 71 Pac. 608, 60 L. R. A. 716.)

The record in this case does not show criminal negligence on the part of the defendant. Negligence rendering a man liable in a civil action for damages does not necessarily ren-

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der him criminally responsible. To have this effect it must be gross. (Clark & Marshall on Law of Crimes, sec. 264; McLain on Criminal Law, sec. 130; Hughes on Criminal Law and Practice, sec. 54; Wharton on Homicide, sec. 477; *Chrystal v. Commonwealth*, 9 Bush, 669; *State v. Justus*, 11 Or. 178, 50 Am. Rep. 470, 8 Pac. 337; *Commonwealth v. Matthews*, 89 Ky. 287, 12 S. W. 333; *State v. Hardie*, 47 Iowa, 647, 26 Am. Rep. 496; *Cleghorn v. Thompson*, 62 Kan. 727, 64 Pac. 605.)

J. J. Guheen, Attorney General, Edwin Snow, Philip R. Hindman and J. H. Hawley, Special Prosecutor, for Respondent.

No affidavits are admissible to impeach or contradict the court record. (11 Cyc. 657; *People v. Judge*, 9 Cal. 19; *Hahn v. Kelley*, 34 Cal. 391, 94 Am. Dec. 742.)

Where the record shows that the accused was present at the commencement of his trial, and nothing to the contrary appears therefrom, it will be presumed that he was present at every subsequent state of the proceeding down to the rendering of the final judgment of the court. (*Dodge v. People*, 4 Neb. 220; *Rhodes v. State*, 23 Ind. 24; *Brown v. State*, 13 Ark. 96; *Smith v. State*, 60 Ga. 430; *Harriman v. State*, 2 Greene (Iowa), 270; *Stephens v. People*, 19 N. Y. 549; *Holmes v. Commonwealth*, 25 Pa. St. 221; *State v. Craton*, 6 Ired. (28 N. C.) 164; *Grimm v. People*, 14 Mich. 300.)

Where, upon the trial of a criminal case, a view of the premises is directed upon motion of the defendant, and no request or expression of desire upon his part to be present at such view is made, his absence from such view is not ground for a new trial. (*State v. Reed*, 3 Idaho, 754, 35 Pac. 706.)

The contumacy of a witness, in persisting in answering a question after the court has ruled it out, furnishes no ground for reversal when the court has expressly instructed the jury to disregard the answer. (*State v. Butterfield*, 75 Mo. 297; *People v. Mead*, 50 Mich. 228, 15 N. W. 95.)

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AILSHIE, J.—The defendant was charged by information of the public prosecutor with the crime of manslaughter in willfully and unlawfully shooting one C. A. Packerham, at the county of Ada, state of Idaho, on the twenty-fifth day of November, 1903. The trial, which took place in February, 1905, resulted in a verdict of guilty, and the defendant was thereafter sentenced to imprisonment in the state penitentiary for a term of six years. This appeal is prosecuted from the judgment and from an order denying defendant's motion for a new trial. The principal facts leading up to and surrounding the homicide are briefly as follows: The defendant left Boise City during the early afternoon of November 25, 1903, with a team, accompanied by James Kelley and Clarence Still, and went up what is commonly known as the Highland Valley road. The three of them were starting on a hunting trip and the wagon was loaded with camp outfit, and they all had their guns. When they reached a point about three-quarters of a mile beyond the Kelley Hot Springs, and some five or six miles from Boise, while driving along the road the defendant McGinnis remarked to his companions that he could hit a certain rock, pointing it out, to the left of the road about two hundred feet distant. Kelley advised him to save his ammunition as it was too close a shot. They drove on a distance of eleven hundred or twelve hundred feet and came to a slight ascent in the road where they stopped the team to rest, and Still appears to have gotten out of the wagon to fix something about the harness. The defendant turned round in the wagon seat and remarked to his companions, "I can hit that rock from here," and took aim and fired. Kelley says he turned round about the same time and saw dust rising on a sandy knoll about five hundred feet distant from the point of firing and in line between the point from which the defendant fired and the rock, and at the same time saw a man fall in the road about two hundred feet from the rock at which the defendant had fired. Kelley remarked, "There is something wrong with that fel-

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low back there; he is hurt or something"; to which the defendant replied, "I guess not; there is no man back there." After a few words were passed between them they told Still to get in the wagon and they turned and drove back and found the man lying in the road wounded by gunshot. The ball had entered the neck just above the collar bone, and, ranging backward and downward, had passed through the lungs and lodged in the third rib on the right side. They put him in their wagon and brought him to Boise, where they placed him in a hospital and where he received medical treatment and attention until the first day of December, on which date he died. The defendant was taken into custody by the officers soon after the wounded man was placed in the hospital. Packenham made an *ante-mortem* statement that was admitted in evidence, in which he said: "Above the Kelley Hot Springs on the road to Highland Valley, as I was passing along on foot, the above-named men (referring to McGinnis, Kelley and Still) appeared behind me on the road in a buggy. I made a cut-off and while off the road they passed me, and after some little distance I came into the road behind them near the Bedell house. They stopped near the Bedell house, and one of them got out and was fooling around when a shot was fired. I felt the bullet strike me in the throat. I began to get dizzy and squatted down to keep from falling. I motioned to them. They stayed there awhile and then got into the buggy and went on a piece; after awhile they turned and came back and stood around awhile, and then they put me in the wagon and brought me to town." The state has contended throughout the case that the killing was due to the criminal negligence of the defendant, or that if it was the result of the commission of a lawful act, that the same was done "without due caution and circumspection." On the other hand, the defendant claims that "the deceased met his death by accident and misfortune, through the unforeseen deflection of a bullet, which occurred in a manner which could not have been anticipated by any human foresight." The two principal errors assigned and relied on are: 1. That

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the trial was had in part during the absence of the defendant; and 2. That the evidence is insufficient to justify the verdict and judgment.

It appears that on the morning of the second day of the trial, and before the defendant had appeared in court, his counsel moved the court, under section 7878, Revised Statutes, for an order directing the sheriff to take the jury to examine and view the place where the offense was alleged to have been committed. Counsel for the state consented and agreed to this motion, and the order was immediately made by the trial judge and the sheriff was sworn to take charge of the jury and keep them together as required by the statute, and two competent persons were appointed by the court to show the jury the place to be viewed by them. It seems that the defendant arrived about the time the jury were ready to start for the inspection. Neither he nor his counsel appear to have manifested any desire that he should accompany the jury, nor was any request made to that effect. The defendant did not go, but his counsel, as well as the counsel for the state, and the trial judge, did go, in company with the jury, sheriff and persons appointed to point out the place. A large number of affidavits have been filed in respect to the presence or absence of the defendant on this occasion. The minutes of the court, standing alone, show that the defendant was present at all times during the trial; but we think it has been successfully shown by the affidavits of defendant and his counsel, and others, that he was not in fact present in the courtroom when the foregoing proceedings were had.

Section 7782, Revised Statutes, provides that: "If the indictment is for a felony, the defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of the defendant." There is an irreconcilable conflict among the decisions and authorities as to whether any absence whatever can be permitted. A very respectable line of authorities hold that a voluntary absence during the argument or ruling on a motion or demurrer is not reversible error. (12 Cyc. 523-527, and notes.) There

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is a very learned and exhaustive note on this question to be found in connection with the case of *People v. Thorn*, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368, where a view and inspection by the jury in the absence of the defendant is considered and the authorities digested. It is clear to us that in the case at bar the defendant was not prejudiced and suffered no injury or wrong on account of his absence from the courtroom during the time his counsel was making the motion in question, and the court was passing on the same and admonishing the jury. The absence appears to have been wholly voluntary and with the knowledge of his counsel, who were present in court and representing him in the legal steps that were taken. While we regard section 7782, *supra*, as mandatory, still a brief, voluntary and temporary absence such as is shown here, where it is apparent that no harm has been done the defendant, should not cause a reversal of a conviction otherwise regular.

Counsel for appellant have suggested upon this appeal that it was error for the trial court to permit an examination and inspection by the jury of the place where the offense is charged to have been committed without having the defendant present on such examination. It does not appear, however, from the record that this ground of error was urged in the trial court at the time of the trial or on motion for a new trial; neither does it appear that any request was made by counsel for the defendant, or by the defendant himself, that he be present at such examination. On the other hand, counsel for defendant was present at all times. The record does not come to us in such condition that we would feel justified in this case, in face of the decision on the same point in *State v. Reed*, 3 Idaho, 754, 35 Pac. 706, in passing upon the question as to whether or not it was error to cause a view and inspection by the jury in the absence of the defendant. The attorney general has called our attention to *State v. Reed*, *supra*, in which this court held that it was not error to have a view of the premises by the jury in the absence of the defendant. We have very grave doubts, however, as to

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the correctness of that decision, and while we are not called upon in this case to either affirm or overrule the doctrine of that case, we are strongly impressed with the fallacy of the reasoning on which that line of authorities is founded. The position taken by the attorney general in the present case amounts, upon the whole, to a quite conclusive argument against the theory on which those cases rest. It is held by that line of authorities that an inspection and examination of the place or premises where the offense is charged to have been committed, or some material fact occurred, is "not a part of the trial," and does not amount to "the taking of evidence in the case." Counsel for the state, however, in arguing the sufficiency of the evidence to support the verdict and judgment, point out the great importance of a personal inspection of the premises and surroundings by the jury and the impression the same must have formed on their minds, and says: "We cannot imagine any evidence that could be given by witnesses upon a matter of this kind that would be as effective with a jury as such personal inspection of the premises. . . . Look at this affair in any way we can, and we must come to the conclusion that the sufficiency of the evidence cannot be decided simply by reading the evidence given by the witnesses, when the more important evidence, the inspection of the premises, was in the hands of the jury." It would be a strange course of reasoning that would hold an inspection of the premises *evidence* in the case for the purpose of weighing the sufficiency of the evidence to support the verdict and judgment, and, on the other hand, would contend and hold that it is not evidence and not a part of the trial, but a mere "aid to understand and apply the evidence," when we come to consider the necessity for the presence of the defendant at such inspection. If it was evidence in the one instance, it was evidence in the other; if it was a part of the trial in the one case, it was a part of the trial in the other, and all the ingenious theories that courts and counsel have drawn from time to time cannot change this palpable fact. We have no doubt of the right of a defendant to

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be present at such an examination and inspection in any and every case where he requests that privilege. We are not prepared, however, to say that he may not waive such right and privilege. Another thing which might enter into the consideration of such a question is as to whether or not the defendant was in custody of the officer at the time of the trial. That fact does not appear in this case. We are not informed by the record whether the defendant was on bail and permitted to come and go at pleasure, or whether he was in custody of the officer and taken back and forth to the jail during the recesses of the court.

The other principal contention made by counsel for defendant on this appeal is that the evidence in the case fails to show the defendant guilty of any offense whatever in connection with this homicide. We have examined the record and the various exhibits very minutely and carefully, and it seems to us that it has been quite clearly established that the defendant failed to exercise that care and consideration which the law requires when he was firing a deadly weapon along the public highway in the manner and under the circumstances shown in this case. While he testifies that he did not see any person in the direction in which he fired, still the physical facts and conditions that surrounded him, the nearness of Pakenham to the object at which defendant claims he fired, the level and open nature of the grounds intervening and surrounding, are all silent but very forceful evidence in contradiction of his story. The fact that defendant on the public highway fired a shot from a gun of carrying power of more than a mile at an object some twelve hundred feet distant and itself only two hundred feet from the highway, was an act of carelessness which becomes culpable where it results in the death of one traveling orderly and peacefully along on that same highway.

The only other assignment of error we deem it necessary to consider in this case is that urged against certain statements made by the witness Pakenham, a brother of the deceased. It appears that he was with the wounded man almost

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continuously from soon after he was taken to the hospital until his death, and in testifying concerning the sickness and death of his brother, said: "He (referring to the deceased) said to me, 'Chester, they have done me up this time.' " This statement by the witness was objected to and the objection was sustained, and the court instructed the jury to disregard it. Further on in the witness' testimony he said: "A little later in the evening and after he was put in his room, he said to me, 'Chester, what did those drunken fools want to kill me for?' " The court ordered this stricken from the evidence and instructed the jury to disregard it. It seems that in the course of the witness' testimony he repeated these statements one or more times, and the court as often warned him against making them and admonished the jury to disregard them. The appellant complains of these statements as prejudicial, and cites in support thereof *State v. Irwin*, 9 Idaho, 35, 71 Pac. 608, 60 L. R. A. 716. While it would not have been out of place to have punished the witness if it appeared to the trial judge that he repeated such statements intentionally and maliciously, still we do not think they prejudiced the defendant's case where the trial court was repeatedly admonishing the jury against considering such statements, and at the same time was cautioning the witness against repeating them. They are not of such a damaging character as to materially prejudice intelligent and fair-minded jurors against the accused. They do not fall within the rule announced in *State v. Irwin*, and do not constitute a ground of reversal.

We have examined the other assignments of error made by appellant, and find nothing in them that constitutes a cause of reversal or appears to require our further consideration here. The judgment should be affirmed, and it is so ordered.

Stockslager, C. J., concurs.

Sullivan, J., concurs in the conclusion reached.

Argument for Appellant.

(June 4, 1906.)

JULIA FLEMING, Appellant, v. WM. R. BAKER et al,
Respondents.

[85 Pac. 1092.]

ORAL CONTRACT FOR TRANSFER OF REAL ESTATE—PART PERFORMANCE—
DIVIDING LINE BETWEEN TRACTS OF REAL ESTATE—ESTABLISHED BY
CONSENT—STATUTE OF FRAUDS.

1. B. and W. entered into a contract to make a certain lane or highway the boundary between their lands, and each took possession of the land falling to him under their agreement, inclosed it and exercised acts of ownership over it for more than fifteen years, and B. expended considerable money in preparing the tract falling to him for cultivation, and erected buildings thereon and leased a portion thereof to others, who erected valuable buildings and other structures thereon without objection or protest from W., and W. died before deeds passed between them. *Held*, under those facts that said agreement does not come within the statute of frauds in regard to oral sales or transfers of real estate.

2. The part performance of said contract brings it within the provisions of section 6008 of the Revised Statutes, and takes it out of the statute of frauds.

(Syllabus by the court.)

APPEAL from District Court of the Sixth Judicial District for Lemhi County. Hon. James M. Stevens, Judge.

Action to quiet title to certain real estate. Judgment for the defendants. *Affirmed*.

John C. Sinclair and John H. Padgham, for Appellant.

In all cases where the location of the true boundary line is known to the owners of contiguous estates, and they undertake for any reason to transfer land from one to the other by a parol agreement, whereby the location of such known boundary is changed, then the statute of frauds will inflexibly apply, and such agreement will be void. (4 Am. & Eng. Ency. of Law, 2d ed., 860-862.)

Argument for Appellant.

Verbal agreements for the exchange of land are within the statute of frauds and are invalid. (*Clark v. Graham*, 6 Wheat. 577, 5 L. ed. 334; *Purcell v. Miner*, 4 Wall. 513, 18 L. ed. 435; *Mather v. Scoles*, 35 Ind. 1; *Sands v. Thompson*, 43 Ind. 18; *Dennis v. Kuster*, 57 Kan. 215, 45 Pac. 602; *Stark v. Cannady*, 3 Litt. 399, 14 Am. Dec. 76; *Beckham v. Mephham*, 97 Mo. App. 161, 70 S. W. 1094.) There must be a conveyance made and possession taken on both sides in order that the contract may be held binding and without the operation of the statute. (*Savage v. Lee*, 101 Ind. 514; *Baldwin v. Thompson*, 15 Iowa, 504; *Hibbard v. Whitney*, 13 Vt. 21; *Purcell v. Miner*, 4 Wall. 513, 18 L. ed. 435.)

Where the estoppel sought to be set up involves the title to land which can only be transferred by deed, it cannot be taken advantage of. (*McPherson v. Walters*, 16 Ala. 714, 50 Am. Dec. 200; *Smith v. Mundy*, 18 Ala. 182, 52 Am. Dec. 221; *Mills v. Graves*, 38 Ill. 455, 87 Am. Dec. 314; *Hays v. Livingston*, 34 Mich. 384, 22 Am. Rep. 533; *White v. Hapeman*, 43 Mich. 267, 38 Am. Rep. 178.)

Where the payment of a consideration of a contract is denied, specific performance should not be decreed without proof of payment or an offer to pay. (*Logan v. McChord*, 2 A. K. Marsh. 224.)

Possession alone is not sufficient to take the case out of the statute. (Notes to 8 Am. & Eng. Ency. of Law, 1st ed., 743.)

Because of the laches of respondent Baker in not bringing action for specific performance, he should be barred from any relief in this action. (22 Am. & Eng. Ency. of Law, 1st ed., 1045, and decisions cited in the notes; *Seculovich v. Morton*, 101 Cal. 674, 40 Am. St. Rep. 106, 36 Pac. 387.)

The contract sought to be enforced must be fully and clearly proved. (*Rice v. Rigley*, 7 Idaho, 115, 61 Pac. 209; *Green v. Begole*, 70 Mich. 602, 38 N. W. 595; *Poland v. O'Connor*, 1 Neb. 50, 93 Am. Dec. 327.)

When a party is already in possession, the act of retaining possession is so equivocal in its nature that equity will not

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regard it as a sufficient part performance. (8 Am. & Eng. Ency. of Law, 1st ed., 744, and cases cited; 3 Sergeant & Rawle, 543; 1 Ballard's Annual on Real Property, sec. 388, and cases cited.)

Acts which are referable to something else than the verbal agreement, and which may be ordinarily otherwise accounted for, do not constitute a specific performance. (Pomeroy on Specific Performance, 154, 155; *Emmel v. Hayes*, 102 Mo. 186, 22 Am. St. Rep. 769, 14 S. W. 209, 11 L. R. A. 323.)

On the subject of part performance to take the case out of the statute of frauds, see *Howes v. Barmon*, 11 Idaho, 64, 81 Pac. 48, 69 L. R. A. 568, *Purcell v. Coleman*, *supra*, and cases cited in the note to *Atwood v. Cobb*, 26 Am. Dec. 661.

H. G. Redwine and F. J. Cowan, for Respondents.

The agreement was fully and completely performed in every particular, except the passing of deeds. There was a part performance entirely sufficient to make the agreement valid.

L. P. Withington and his successors in interest are estopped from claiming title to the land. (16 Cyc. 765, 768.)

SULLIVAN, J.—This is an action to quiet title to eight and four-tenths acres of land situated in the south half of the northeast quarter of section 4, township 20 north, of range 23, in Lemhi county.

Respondents answered separately, each pleading four separate defenses: (1) A denial of the allegations of the complaint; (2) the establishment of the boundary line by verbal agreement; (3) that in the year 1887, a mutual understanding was had between the defendants Baker and the predecessor in interest of plaintiff, that as soon as patents were issued by the United States to the respective claimants, for their several tracts of land, that it would be to their mutual benefit to enter into a contract to exchange certain parts of their land, making a certain road or highway the boundary, and Baker to convey to the said Withington a tract containing two and eight-tenths acres, and Withington to convey to

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Baker eight and four-tenths acres of land, and a contract was entered into to that effect in the year 1890; (4) adverse possession under claim of title. The prayer of the defendants is that the plaintiff be enjoined from setting up title, and that defendant Baker be decreed to be the owner of said eight and four-tenths acres of land.

Respondent Bagley's answer shows that he is holding as tenant of respondent Baker.

Trial was had before the court without a jury, and findings and judgment made and entered against the plaintiff. A motion for a new trial was overruled. The insufficiency of the evidence to support the findings of fact is assigned as error.

The following, among other facts, are clearly established by the evidence: That one L. P. Withington, now deceased, was the husband and predecessor in interest of the appellant, Julia Fleming, and the respondent Baker occupied adjoining lands for thirty years, which land was held by them several years prior to the extension of the government survey over them.

Thereafter Withington entered the northeast quarter and the north half of the southeast quarter of section 4, township 20, range 23, in Lemhi county, as a desert claim and obtained a patent therefor from the United States on August 18, 1890.

The eight and four-tenths acres of land in dispute is a part of the land entered by Withington. Said Withington died in 1902, intestate, leaving as his heirs the appellant and several children, all of whom have conveyed their interests to the appellant, and she is now the owner thereof. Respondent Baker entered adjoining land and received a patent from the United States to the same on February 12, 1887.

In the year of 1884 or 1885, an understanding was had between said Withington and Baker that a stage road and a lane which ran across said lands should be their dividing line when they received their patents from the United States, and that when they received their patents from the United States the respondent Baker would deed to said Withington

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all the land included in his said patent, which lay south of said road; while said Withington would deed to Baker all of the land included in his patent that lay north of said road. And it was understood between them that the stage road and lane should be the boundary line between their respective lands. Such an agreement was orally entered into in 1890. In 1884, the eight and four-tenths acres in controversy was in a very rough and uneven condition, requiring considerable work to prepare it for cultivation, while the two and eight-tenths acres tract of the Baker land, lying north of said road, was in a good state of cultivation and had been cultivated for several years prior thereto; that during all the time these parties resided there, they occupied and possessed said two tracts of land as per the terms of said agreement. Said tract of eight and four-tenths acres was inclosed in a large field owned by Baker, and the two and eight-tenths acres tract was in a large field owned by Withington, each exercising acts of ownership and having possession of the said tracts according to said agreement. Said agreement to make said road the dividing line was recognized by said parties up to the time of Withington's death, but no deeds or muniments of title were passed between them. Said Withington made no claim to that part of his tract of land on the north side of said road and inclosed by Baker; and Baker made no claim to that part of his land south of said road claimed by Withington.

After Baker took possession of said eight and four-tenths acres tract, he removed the rocks and ridges therefrom and placed the same in cultivation, and constructed a building thereon of the value of \$200, and leased a part of same to respondent Bagley, who has erected a storeroom thereon of the value of \$700; and other parties have built a hotel, saloon, barn, cellar, ice-house and hay corral upon said land. The first claim made to this land, after said agreement was entered into by Withington and Baker, was made after the death of Withington and after the marriage of his widow, the appellant, to another man.

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It clearly appears, from the evidence in the case, that a part performance of said oral agreement in regard to making the stage road the dividing line between said tracts of land was carried out; and in fact a complete performance of that contract, excepting the passing of deeds between the parties. For nearly twenty years the said agreement has been recognized and acted upon. Said eight and four-tenths acres of land was taken possession of by the respondent Baker, who placed it in a good state of cultivation, and improvements in the way of buildings, etc., have been placed thereon, of the value of many hundreds of dollars, and so far as appears from the record, with the knowledge and consent of said Withington and his successor. It certainly would not be just and equitable to allow the appellant at this late day, under the facts of this case, to obtain a judgment as prayed for in her complaint. It clearly appears that the complete performance of said agreement was had between the parties, except the passing of deeds, and that clearly brings this case within the provisions of section 6008 of the Revised Statutes, which is as follows: "The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof."

By reason of the part performance of said contract, it does not come within the statute of frauds prohibiting oral sales of real estate.

We have examined the other errors assigned and find no merit in them. The judgment is affirmed, with cost in favor of the respondents.

Stockslager, C. J., and Ailshie, J., concur.

Argument for Appellant.

(June 13, 1906.)

ELLEN L. BUSH, Appellant, v. C. C. HAVIRD, Sheriff, et al., Respondents.

[86 Pac. 529.]

LANDLORD AND TENANT—TRADE FIXTURES—RIGHT OF REMOVAL BY TENANT—WHEN MAY REMOVE—RIGHTS OF MORTGAGEE OF FIXTURES.

1. Property consisting of front and back bar, ice-chest, etc., placed in a saloon building by a lessee and fastened to the wall and floor, constitutes trade fixtures, and may be removed by the tenant during the continuance of his term.

2. Trade fixtures must be removed by the tenant prior to his surrender of possession to the landlord, and if not so done, and there is no agreement to the contrary, the right of the tenant to re-enter the premises and sever the fixtures from the realty and remove them will be deemed lost and abandoned.

3. The mortgagee of trade fixtures acquires no greater rights in and to the property than those enjoyed by the tenant, and when the tenant's right to re-enter and sever and remove fixtures has ceased, the rights of the mortgagee also cease.

(Syllabus by the court.)

APPEAL from District Court of the Third Judicial District for Ada County. Hon. George H. Stewart, Judge.

Action by plaintiff to recover damages for the wrongful and unlawful severing and removal of certain fixtures from a building owned by plaintiff. From a judgment in favor of defendants, plaintiff appeals. *Reversed.*

Hawley, Puckett & Hawley, for Appellant.

The term "bar-room fixtures" means fixtures in a bar-room, and when the word "fixtures" is used in such connection it means something affixed to the realty. (*Hogard v. California Ins. Co.* (Cal.), 11 Pac. 594, 598.)

Bar fixtures placed in a saloon are not removable by the saloon-keeper at the termination of his lease. (*O'Brien v.*

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Kusterer, 27 Mich. 289.) Electric light fixtures are a part of the realty. (*Canning v. Owen*, 22 R. I. 624, 84 Am. St. Rep. 858, 48 Atl. 1033; *Flint etc. Mfg. Co. v. Douglass Sugar Co.*, 54 Kan. 455, 38 Pac. 566.)

A fixture put in by a tenant, and which he has a right to remove during his term, cannot ordinarily be removed afterward, or after he surrenders possession after the expiration of his lease. The removal must be made before the termination or not at all. (*Stockwell v. Marks*, 17 Me. 455, 35 Am. Dec. 266; *Bliss v. Whitney*, 9 Allen, 115, 85 Am. Dec. 745; *Keogh v. Daniel*, 12 Wis. 163; *Joslyn v. McCabe*, 46 Wis. 591, 1 N. W. 174; *Watriss v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694.)

The tenant's right of removal must be exercised during the term, or before he surrenders possession, or he cannot exercise it. (13 Am. & Eng. Ency. of Law, 648 et seq., and cases cited; *Preston v. Briggs*, 16 Vt. 125.)

The mortgagee can acquire no greater rights, and has no other rights so far as the removal of fixtures is concerned, than has the tenant under whom he claims. (13 Am. & Eng. Ency. of Law, 653; *Free v. Stewart*, 39 Neb. 220, 57 N. W. 991; *Fuller v. Brownell*, 48 Neb. 145, 67 N. W. 6.)

Karl Paine, for Respondents.

The record shows that none of the articles were fixtures. It was stipulated that the front bar, back bar, iron rail and chandeliers were attached to the building belonging to appellant, but they were not affixed thereto. By subdivision 2 of section 2825 of the Revised Statutes, that which is affixed to land is real estate. A chattel must be affixed to real estate before it will become a fixture. (19 Cyc. 1035, note 3.) That fixtures should be considered real property until severed seems clear upon principle, and the weight of authority is to that effect, though there are respectable authorities to the contrary. (13 Am. & Eng. Ency. of Law, 2d ed., 641.)

Each article, the seizing of which appellant complains, was attached to the building to that extent only that was neces-

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sary to its advantageous use; neither the building nor the articles suffered appreciable injury by being removed. That articles that are attached to realty under similar circumstances are personal property, see the following decisions from the supreme court of Washington: *Sherick v. Cotter*, 28 Wash. 25, 92 Am. St. Rep. 821, 68 Pac. 172; *Neufelder v. Third St. & S. Ry.*, 23 Wash. 470, 83 Am. St. Rep. 831, 63 Pac. 197, 53 L. R. A. 600; *Hall v. Law Guarantee & Trust Soc.*, 22 Wash. 305, 79 Am. St. Rep. 935, 60 Pac. 643; *Philadelphia Mortgage & Trust Co. v. Miller*, 20 Wash. 607, 72 Am. St. Rep. 138, 56 Pac. 382, 44 L. R. A. 559; *German Sav. & Loan Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267; *Washington Nat. Bank of Seattle v. Smith*, 15 Wash. 160, 45 Pac. 736; *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639; *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744; *Bergh v. Herring-Hall-Marvin Safe Co.*, 136 Fed. 368, 69 C. C. A. 212, 70 L. R. A. 756; *Chapman v. Union Mutual Life Ins. Co.*, 4 Ill. App. 29.

The chandeliers were personalty according to a large majority of the decisions. (13 Am. & Eng. Ency. of Law, 2d ed., 666, note 2; 19 Cyc. 1060, note 21; *Hall v. Law Guarantee & Trust Soc.*, *supra*; *Chapman v. Union Mutual Life Ins. Co.*, *supra*; *Condit v. Goodwin*, 89 N. Y. Supp. 827, 44 Misc. Rep. 213.)

An agreement or an intention that the chattel shall remain personalty may be implied from the circumstances under which the chattel is bought and affixed, as from a conditional sale, from a lease of a chattel, or from a chattel mortgage by the buyer to the seller, prior to and in some states subsequent to the annexation. (19 Cyc. 1048, 1049; *Bernheimer v. Adams*, 75 N. Y. Supp. 93, 70 App. Div. 114; *Ames v. Trenton Brewing Co.*, 56 N. J. Eq. 309, 38 Atl. 858.)

In determining whether a thing is a fixture or not, the relation of the parties must be considered. (*Bingham Co. etc. Assn. v. Rogers*, 7 Idaho, 65, 59 Pac. 31.)

Trade fixtures that do not fall within the category known as "real estate fixtures" will be treated as personalty, pro-

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vided the lessee is authorized to remove them at the end of his term. (19 Cyc. 1067.)

AILSHIE, J.—In this case the lessees of a saloon building in Boise City placed the usual bar fixtures, ice-chest, etc., in the building, attaching them to the same with screws, and also put in electric chandeliers and linoleum on the floor, and such other fixtures as are usually found in such places. Some time afterward the tenant executed to one Poole a chattel mortgage on all this property as security for the payment of a promissory note in the sum of \$300. The mortgage was executed on the eighteenth day of February, 1905. The tenant neglected and refused to pay his rent as provided for in the lease, and on the thirteenth day of June, 1905, the landlord, the plaintiff in this case, commenced an action for the sum of \$85 rent due, and for treble damages for detention of the premises and for restitution thereof. The trial resulted in a judgment in favor of the plaintiff for rent and treble damages and the restitution of the premises, and on the seventeenth day of June, 1905, the sheriff evicted the tenant and placed the plaintiff in possession. The tenant does not appear to have claimed, or sought to remove, any of the fixtures he had placed in the building, nor did the sheriff remove them, nor does any demand appear to have ever been made for them by the tenant. On the first day of May, 1905, the mortgagee, Poole, sold and assigned his note and mortgage to the defendants, B. H. Coleman & Company, and on the fifth day of July, Coleman & Company commenced proceedings before the sheriff for the foreclosure of their mortgage upon the fixtures. The sheriff duly and regularly served notice of the foreclosure proceedings, and on the eighth day of July, 1905, demanded of the plaintiff the possession of the property described in the mortgage, and that she deliver to him the key to the premises that he might remove the property therefrom. The plaintiff refused to deliver up possession of the property or to surrender the key to the premises, and the sheriff thereupon, under direction of the owners

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and holders of the mortgage, broke open and forcibly entered the building and removed all of the property therefrom.

The present case was commenced by the landlord against the sheriff and the assignees of the mortgage to recover judgment against them for the value of the property forcibly removed by them from the saloon building after the expiration of the term of the tenant and after his eviction under judgment and process from the proper court. The property removed by the sheriff from the saloon building under the foreclosure proceedings was, undoubtedly, "trade fixtures," except the curtain, which was a mere piece of personal property. (Bronson on Fixtures, sec. 33b, pp. 186-189; 19 Cyc. 1065; 13 Am. & Eng. Ency. of Law, 2d ed., 642.) Being that class of property commonly known and designated as trade fixtures, and being common to and used in the saloon business, the tenant was entitled to remove it at any time prior to the termination of his tenancy. Section 2882, Revised Statutes, provides as follows: "A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for the purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises." This statute clearly provides that the tenant may remove such fixtures during the continuance of his term, and is equally an implied prohibition against a removal at any time after the expiration of the term. It is the rule, however, even in the absence of a statute, by an almost unbroken line of authorities, that trade fixtures must be removed by the tenant prior to his surrender of possession to the landlord, and that if he fails to do so, and there is no agreement to the contrary, the right of the tenant to sever the property from the realty will be lost by him. (Taylor on Landlord and Tenant, 9th ed., sec. 551; Wood on Landlord and Tenant, 2d ed., sec. 529; note to *Holmes v. Tremper*, 11 Am. Dec. 241; *Merritt v. Judd*, 14 Cal. 60. See discussion in *Brown v. Reno Elec. Light & Power Co.*, 55 Fed. 229.)

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In the case at bar it is clear to us, as above stated, that the property was "trade fixtures" such as the tenant might remove at any time prior to the surrender of possession. It is equally clear that when he surrendered up the possession—or, as in this case, having committed a breach of the lease and refused to surrender possession, the landlord securing his eviction by legal process, and the tenant not taking with him the property that he was entitled to remove during his term, and having made no claim or demand for the property at the time—he lost his right to sever the same and remove it, as well as lost the right to re-enter the premises for such purpose or any other purpose. The only further question left for our determination is: Did the mortgagee or his assignees acquire any greater or superior rights to those of the tenant or mortgagor? We think there can be but one answer to that question. When the mortgagee took a mortgage on this property he took it subject to all the restrictions placed by law upon the tenant, who was the mortgagor, and he could acquire no rights greater than or superior to those of his mortgagor. (*Sweet v. Myers*, 3 S. Dak. 324, 53 N. W. 187; *Free v. Stuart*, 39 Neb. 220, 57 N. W. 991; *Fuller v. Brownell*, 48 Neb. 145, 67 N. W. 6; *Talbot v. Whipple*, 14 Allen (Mass.), 177; 13 Am. & Eng. Ency of Law, 2d ed., 653.) When the tenant abandoned his right of removing this property and lost the possession and right to re-enter, that disability extended to his mortgagee with equal force and effect. The law will neither impose upon the landlord a duty nor necessity of either housing or taking care of the fixtures which his tenant leaves behind after his term has expired. Neither will the law permit the tenant nor anyone claiming under him, to re-enter the premises, for the reason that to do so would encourage breaches of the peace, and would in many cases hazard and impair the landlord's rights of leasing the premises to another tenant, and lessen the full and free enjoyment of those premises by such tenant.

The judgment must be reversed, and it is so ordered, and the cause is remanded to the trial court, with direction to

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enter judgment in favor of plaintiff for the value of the fixtures wrongfully and unlawfully removed and converted. Costs awarded in favor of appellant.

Stockslager, C. J., and Sullivan, J., concur.

ON PETITION FOR REHEARING.

(July 9, 1906.)

AILSHIE, J.—Counsel for respondents has filed a petition for a rehearing in which he rather bitterly laments the loss of an ice-chest by reason of our former decision. After a further examination of the transcript in the case, we are of the opinion that he should have his ice-chest. Counsel for both appellant and respondents having repeatedly referred to the front and back bars and ice-chest in the same connection and treated them in the same manner, we were led to the conclusion that they were all affixed and attached to the building in the same manner; but a further examination of the record discloses the fact that it is stipulated that the ice-chest “was not attached to either the walls or floor of said building by screws or otherwise.” Without any further discussion as to the manner and method of attaching trade fixtures to a building, or the necessity for any particular kind or character of annexation in particular instances, we are content in this case to say that the ice-chest about which respondents’ counsel particularly complains was a mere article of personal property the same as the chairs and tables in the saloon, and should not be classed with the front and back bar as trade fixtures, as we have heretofore designated in the original opinion. We have not regarded it necessary to go into any extended discussion as to what constitutes trade fixtures nor as to the character of property that may be treated as such, nor have we attempted to point out any inviolable rule by which to distinguish between that class of property and such as may be ordinarily treated as mere personal property. We did, however, cite authorities which treat this subject in support of the statement that the property designated in the

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original opinion is that class of property known as trade fixtures.

Counsel in his petition for rehearing complains because this court has not seen fit to go into a discussion of the question as to the right of a lessee to mortgage fixtures under the law authorizing mortgages on personal property. We have not questioned his right to do so, and it is clear, both upon principle and authority, that the lessee of premises may mortgage any property that he places thereon, and which he has a right to remove. As between the mortgagor and mortgagee, it would make no difference whether he attached such property to the premises or not; the mortgagor by his own act could not convert property which he mortgaged as personalty into real estate so as to defeat the mortgage. It should be borne in mind, however—a distinction which counsel seems to have overlooked—that the lessee of the premises cannot enter into any agreement by way of mortgage or otherwise with a stranger, to which his landlord is not a party, that will in any way diminish or affect the rights of the landlord, or give to the mortgagee any rights or privileges superior to those enjoyed by the tenant. Any agreement between the tenant and a third party that certain property shall not become a fixture will not prevent it from, in fact, becoming a fixture in so far as the landlord is concerned and his rights are involved.

The original opinion herein will be modified to the extent of holding that the ice-chest described in the stipulation of facts was not a trade fixture. In other respects the original opinion will stand as the decision of the court. Costs awarded in favor of appellant.

Stockslager, C. J., and Sullivan, J., concur.

Points Decided.

(June 13, 1906.)

A. T. SPOTSWOOD et al., Respondents, v. J. B. MORRIS,
as Administrator, et al., Appellants.

[85 Pac. 1094.]

CONSTITUTIONAL LAW—UNINCORPORATED ASSOCIATIONS AND JOINT STOCK COMPANIES—ARTICLES OF ASSOCIATION—REAL ESTATE—PARTNERSHIP—POWERS OF OFFICERS AND SHAREHOLDERS—LISTING REAL ESTATE FOR SALE WITH AGENTS—PROCURING A PURCHASER.

1. Under the provisions of sections 2 and 16, article 11, of the constitution of Idaho, an unincorporated association or joint stock company may be formed by individuals for the purchase of a single tract of real estate, the title to which may be taken in a trustee, and the articles of agreement of the association may provide that the death of a shareholder shall not result in the dissolution of the association, and may so limit the liability of the association and may provide that either or any of the officers or shareholders shall not sell or dispose of any of the property of the association without the concurrence of the shareholders.

2. Said association does not have or exercise any of the powers or privileges of corporations not possessed by individuals or partnerships.

3. To legally possess or exercise powers or privileges of corporations requires a sovereign grant.

4. Under the common law, joint stock companies are legal, and are not prohibited by the constitution and statutes of this state, provided they do not have or exercise any of the powers or privileges of corporations not possessed by individuals or partnerships.

5. As the constitution of Idaho and the statutes of the state do not prohibit the organization of joint stock associations having transferable stock, and which do not usurp the functions of a corporation nor exercise any of the powers or privileges of corporations not possessed by individuals or partnerships, the common-law rule as to their legality prevails in this state.

6. In the organization of said association there is the absence of the *delectus personae*, which characterizes ordinary partnerships from corporations; and the death of one of its members or the sale of the interest of one of the shareholders does not dissolve it.

7. The limitation of the agency of the members of the association is an incident of such associations, under the common law, resulting from the lack of the right of *delectus personae*, and not an incident of the corporation not possessed by a partnership.

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8. Such an association is a partnership, but not a general partnership wherein one of the partners has plenary power to sell and otherwise dispose of the property of the association or create indebtedness beyond that provided for in the articles of association.

9. While some of the principles of partnership may apply to such associations, they cannot, from the very nature of the organization thereof, be entirely controlled by the legal rules and principles that control ordinary partnerships.

10. *Held*, under said articles of incorporation, the vice-president or secretary have no authority to list the association's real estate with respondents for sale.

11. *Held*, that the respondents failed to show that the shareholders of said association ever authorized the vice-president or secretary to list said real estate for sale with the respondents or ratified the same.

12. *Held*, under the evidence, that respondents did not procure a purchaser for said land.

(Syllabus by the court.)

APPEAL from the District Court of the Second Judicial District for Nez Perce County. Hon. Edgar C. Steele, Judge.

Action to recover commissions for procuring a purchaser for an alleged sale of real estate. Judgment for plaintiffs. *Reversed*.

James E. Babb and Daniel Needham, for Appellants.

The purchaser's attention having first been directed to the land by appellants through a circular describing the same and putting a price thereon, and the purchaser having started from Iowa to see the land because of this circular, and having only accidentally met the plaintiffs on his way to see the appellants and this land, the plaintiffs can have no claim for a commission, since the purchaser was a customer of the appellants and they had a property in him which the plaintiffs could not take from them. (4 Am. & Eng. Ency. of Law, 2d ed., 980; *Bryan v. Albert*, 3 App. Cas. (D. C.) 180; *Loyd v. Matthews*, 51 N. Y. 124; *Sussdorff v. Schmidt*, 55 N. Y.

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319; *Burkholder v. Fonner*, 34 Neb. 1, 51 N. W. 293; *Hanford v. Shapter*, 4 Daly (N. Y.), 243.)

Neither Robert Schleicher nor Benjamin F. Morris, nor both of them, had authority under the articles of the Denver Townsite Company to employ the plaintiffs as brokers. (*Wilis v. Greiner* (Tex. Civ. App.), 26 S. W. 858.)

(On the question of the status of joint stock associations under the constitution and laws of Idaho, appellants cite the same authorities cited in the decision.)

I. N. Smith, for Respondents.

The defendants here were a partnership—self-styled “joint stock association”—whatever that may be under the Idaho law. As such they are partners, and the liability of members of a “joint stock company” to third parties is the same as partners. (*Claggett v. Kilbourne*, 1 Black, 346, 17 L. ed. 213; 17 Am. & Eng. Ency. of Law, 2d ed., 636, also 637, note 2; *Carter v. McClure*, 98 Tenn. 109, 60 Am. St. Rep. 842, 38 S. W. 585, 36 L. R. A. 282; *Robinson v. Smith*, 3 Paige, 222; *Allen v. Lang*, 80 Tex. 261, 26 Am. St. Rep. 735, 16 S. W. 43; *Bullard v. Kinney*, 10 Cal. 60; *Butterfield v. Beardsley*, 28 Mich. 412; *Webster v. Clark*, 34 Fla. 637, 43 Am. St. Rep. 217, 16 South. 601, 27 L. R. A. 126; *Spaulding v. Stubbings*, 86 Wis. 255, 39 Am. St. Rep. 888, 56 N. W. 469; *Goldsmith v. Eichold Bros. etc.*, 94 Ala. 116, 33 Am. St. Rep. 97, 10 South. 80.)

Because the defendants were partners the power of one partner to bind the others existed; especially is this so as to Schleicher, because his authority required him to sell these lands.

Schleicher was the trustee of an express trust which required him to sell this land.

The trustee of an express trust has power to employ the usual agencies which ordinarily prudent men employ in their own business to carry out the terms of the trust imposed upon him. This extends to the employment of agents to do all things, which do not include the delegation of the discre-

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tionary terms of the trust. (Eaton's Equity, sec. 203; Bispham's Principles of Equity, 6th ed., 206; 2 Pomeroy's Equity, sec. 1068; Lewis on Trusts, *435-*632; *Tyler v. Herring*, 67 Miss. 169, 19 Am. St. Rep. 263, 8 South. 840.)

A trustee is not bound to do everything himself, and thus, to carry out his trust, he may employ agents.

A trustee employed to sell may employ auctioneer. (*Kennedy v. Dunn*, 58 Cal. 340; *Fogarty v. Sawyer*, 23 Cal. 570; *Gillispie v. Smith*, 29 Ill. 473, 81 Am. Dec. 328; *Hawley v. James*, 5 Paige, 478; *Cranston v. Crane*, 97 Mass. 459, 93 Am. Dec. 106; *Palmer v. Young*, 96 Ga. 246, 51 Am. St. Rep. 136, 22 S. E. 928; *Matter of Pratt*, 119 Cal. 156, 51 Pac. 47; 28 Am. & Eng. Ency. of Law, 2d ed., 990, note 4.)

Joint stock companies are unknown to the laws of Idaho. We have only corporations or partnerships. This being true, and there being no provisions for the recordation of such instruments as these "Articles of Association"—the record thereof was a nullity, was not constructive notice of anything—and was simply an encumbrance on the public records, which should be expunged. (24 Am. & Eng. Ency. of Law, 2d ed., 141.)

Schleicher was held out to the public as the agent with plenary powers of this association. (10 Cyc. 912, note 72.) People dealing with agents of the kind that Schleicher was are not charged with knowledge of secret by-laws. (Morawetz on Corporations, sec. 593.)

The Revised Statutes of Idaho, at section 18, provide that the common law of England, so far as it is not repugnant to or inconsistent with the constitution and laws of the United States, in all cases not provided for in these Revised Statutes, is the rule of decisions in all the courts of this territory. It is reasonable to argue that by this expression is meant the law and statutes of England as they stood at the end of the Revolutionary War. This would include the "Bubble Act," under which all joint stock associations were nuisances, and especially those seeking to exercise the functions of a corporation. (*Browning v. Browning*, 3 N. Mex. 371, 9 Pac. 677.)

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Under this decision the "Bubble Act" would be part of the common law of England adopted in Idaho.

The "Bubble Act" declares joint stock associations to be nuisances. Our constitution requires that they shall be authorized by express law or general law so that they can be under the control of the state.

Any joint stock company exercising any of the functions of a corporation, which joint stock company is not organized under any of the laws of Idaho, would be a nuisance. Therefore the Denver Townsite Company is a nuisance.

(See, also, authorities cited by same counsel in case of same title, 10 Idaho, 129, 77 Pac. 216.)

SULLIVAN, J.—This is an action to recover \$2,350, and interest for commission as real estate brokers, for the sale of certain land situated in Idaho county. The sufficiency of the complaint was sustained by this court on a former appeal (10 Idaho, 129, 77 Pac. 216). After filing the *remittitur* in the court below, the administrator and administratrix of the Benjamin F. Morris estate answered, as did also the defendants, John P. Vollmer and Robert Schleicher. The other defendants were not served with summons and did not appear in the action.

It is alleged, among other things, in the complaint, that the appellants were copartners engaged in general real estate brokerage and commission business at the town of Moscow, Latah county, and were engaged, among other things, in procuring purchasers for lands belonging to third persons, and buying and selling real estate for others; that Benjamin F. Morris was a resident and inhabitant of Lewiston, Idaho, and that on the fourth day of June, 1902, he died intestate, leaving surviving him certain heirs, and that the said J. B. Morris and Harry F. Morris were duly appointed administrator and administratrix of the estate of said deceased; that during the lifetime of said Morris, in the year 1895, he and the defendants, Dernham, Kauffman, Vollmer, Schleicher and Scott, associated themselves together by an instrument in writ-

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ing, dated September 18, 1895, in a syndicate to purchase of and from said Morris, now deceased, certain real estate, describing it, consisting of 2,720.80 acres of land, situated in Idaho county, for the purpose of reselling the same and dividing the profits thereof, in which syndicate each of said persons, except said Morris, deceased, acquired and was the owner of and entitled to a one-eighth part of said land and the profits thereof, and that said Morris, deceased, acquired in said association a three-eighths interest and was entitled to three-eighths of the profits thereof; that by said article of agreement the said Morris, now deceased, was required to, and did, deed in trust for said syndicate said lands to the said Robert Schleicher, and that by the terms of said articles to facilitate the accomplishment and purpose of said syndicate, the said Schleicher was appointed secretary of said association under the following agreement, which was signed by each of said defendants:

“This instrument, made this 18th day of September, 1895, witnesseth, that whereas, Benjamin F. Morris, was the owner of the following lands in Idaho county, Idaho, to-wit: (Here follows a description of said 2720 80-100 acres) . . . and he agreed with the following persons, to-wit: Henry Dernham and William Kauffman, of Moscow, Idaho, John P. Vollmer and Robert Schleicher, of Lewiston, Idaho, and Wallace Scott of Mt. Idaho, Idaho, to join them in a syndicate to purchase said lands of him and resell the same and divide the profits thereof, in which syndicate each of said persons should take and pay for a one-eighth share and be the owner of and entitled to a like portion of the profits thereof, and said Benjamin F. Morris should take and pay for a three-eighth share, and be the owner of and entitled to a like portion of the profits thereof. . . . And whereas, said Benjamin F. Morris has by deed of even date herewith conveyed to Robert Schleicher in trust for this syndicate according to these articles of agreement said 2720.80 acres, all except the 166 acres last above described, subject to a mortgage on which there is due of principal nine thousand dollars besides inter-

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est, and to the payment by the syndicate, including Benjamin F. Morris, of 4320.00-100 dollars of the purchase money, with interest thereon from the 1st day of May, 1895, at the rate of 10 per centum per annum until paid.

“Now, therefore, in order to facilitate the accomplishment of the purposes of said syndicate, we, the said parties, hereby organize ourselves into an association and agree as follows: 1. That the name of said association shall be the Denver Townsite Company, and the principal office of said association shall be at Lewiston, Idaho. 2. That the members of the association and their executors, administrators, heirs and assigns, shall, in proportion to their interests therein, pay the obligations thereof, and share in the profits thereof. 3. That the title to said lands is to be subject to all the terms and provisions, powers and trusts of these articles of agreement and the amendments and alterations thereof which may be made from time to time. 4. That this association shall not be dissolved or any of the powers herein given or which may be given, be revoked by any transfer at any time of the interest of any member thereof, or any part thereof, whether by act of the party or by operation of law, or by the death of any member or members thereof, or their successor or successors at any time. 5. That in order to maintain and continue this association no member or members, or successor or successors thereof shall for five years from date hereof have any right of partition of said lands or any of them, but shall have such right thereafter. These articles of agreement shall be binding upon the parties, their assigns, whether by act of party or operation of law, and their heirs, devisees, executors and administrators. 6. The interests of the members of this association in the property thereof shall be represented by eight certificates which shall be and are hereby agreed to be personal property. The members have only a right to the avails or proceeds of said property, the title thereto both legal and equitable remaining and being in said trustee, his successor or successors in trust. (Here follows a form of a shareholder's certificate.) . . . 8. The certificate of shares in and

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interests of members of this association in its property can only be transferred in the manner prescribed in the form of certificate last above set forth and not then unless all obligations of the assignor to the association are paid. No transfer shall be made for five days immediately before a meeting of the shareholders or for five days immediately before the time when a dividend is payable. 9. That the annual meeting of the shareholders shall be held in Lewiston, Idaho, at the office of First National Bank, of Lewiston, Idaho, on the second Tuesday of May, each year, at 2 o'clock, P. M. That no meeting of shareholders shall be competent to transact business unless a majority in interest of the shareholders shall be represented, but less than a majority may adjourn from day to day or until such time as may be deemed proper; that at such annual meeting a president, vice president and secretary for the ensuing year shall be elected by ballot, to serve one year, until their successors are elected and qualified. Special meetings of the shareholders may be called by any three shareholders by notice in writing, by mail or otherwise, to meet at Lewiston, Idaho, at the office of the First National Bank of Lewiston, Idaho, at an hour to be designated in the notice, such notice to be mailed or served not less than five days prior to date of meeting. When all shareholders assemble and so agree, either in person or by proxy appointed in writing, a special meeting may be held without any notice. That at all meetings of the shareholders each shareholder shall be entitled to cast one vote for each certificate held by him. He may vote in person or by proxy appointed in writing. The president or presiding officer may vote his own share or shares, but shall not have power in addition as presiding officer to decide a tie vote. The secretary shall keep a record of each meeting. 10. That a majority in interest of the shareholders of this association at any meeting thereof, shall have as full and ample power and authority to do or authorize to be done any and everything of every nature whatsoever, as an individual owner of said lands in fee simple would have, provided only that they cannot issue or author-

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ize the issue of any negotiable instruments or borrow money, except to renew or extend or take up or pay off a mortgage or vendor's lien on said lands or some part thereof; that the only other manner in which they can raise money (except from income or sale of property) is by levy of assessments as hereinafter provided, upon the shareholders; that nothing except the consent of all the shareholders shall authorize the creation of any personal liability against the shareholders, and all contracts entered into shall be limited to creating a liability against the property of the association.

11. The officers of this association shall consist of a president, vice president and secretary, who shall be elected by the shareholders and shall perform the duties usually appertaining to their respective offices, except that the secretary shall perform also the duties usually appertaining to the office of treasurer. They shall hold office for one year and until their successors are elected and qualified. . . . No person shall hold any of those offices unless he be a shareholder, and a transfer of his share as provided in these articles of agreement shall operate as a resignation by him. . . .

12. The secretary of this association is hereby required, authorized and empowered to sell, contract for sale of and convey by such form of conveyance as he may deem best, all or any part of the lands or lots or blocks contained in the 2720.80 acres above described for such price or prices, and upon such terms, at public or private sale, as he may deem best, subject to the directions of the shareholders, and no purchaser need see to the application of the purchase money or to any such directions of the shareholders, or to the qualifications of the secretary as such officer. He shall have these articles of agreement and said deed to him recorded in Idaho county. The secretary shall also have power to sell all products which may be received from any of said lands when and for such prices and on such terms as he may deem best. He may, out of any money in his hands as secretary or treasurer, pay the taxes on said lands, insurance premiums on any property of the association, or any property on which it may have an incumbrance, and

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interest on any incumbrance or incumbrances on said lands or any part thereof, also all necessary repairs at the wells or of fences or other property on said lands, and all expenses incident to construction of fences made necessary by any changes in roads. He may take any action he may deem most for the interest of the association in the matter of any actions or proceedings of the county commissioners concerning roads. The secretary shall incur no obligations which shall altogether exceed five hundred dollars without additional authority. He may deposit any money on hand in his name as treasurer of Denver Townsite Co. in any National Bank and check out the same. He may procure such record books and stationery and blanks, from time to time, as may be necessary. He shall keep an account and record of the affairs of the company and render accounts and reports at the annual meetings and record the same in the record book of such meetings and whenever requested by vote at any meeting render accounts and pay over any money due the Denver Townsite Company."

It is also alleged that the said Dernham, about the year 1898, removed out of the state of Idaho, and since that time has been a nonresident; that about the month of May, 1902, said defendants, acting by and through their vice-president, Benjamin F. Morris, and acting by and through their secretary, Robert Schleicher, listed with the plaintiffs the said lands and premises for sale, and employed plaintiffs to procure a purchaser for said lands at a sum sufficient to pay the plaintiffs five per cent commission and net the defendants \$17.50 per acre, reserving to defendants the crops thereon for the year 1902, and that plaintiffs accepted said employment and entered upon the discharge of their duties thereunder immediately, and attempted to and did procure a purchaser for said lands who was ready, willing and able to purchase the same and pay therefor, and introduced said purchaser to the defendants through their vice-president. That thereafter, while plaintiffs were still negotiating with said purchaser for the sale of said lands on the terms above stated, the defendants concluded and perfected a sale of said lands to

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said purchaser so procured by plaintiffs, and sold the same to said purchaser for the sum of \$47,000 on August 15, 1902, the same being a smaller sum than the sum for which the defendants had listed the said lands with the plaintiffs. It is further alleged that plaintiffs presented their said claim for the sum of \$2,350, with interest thereon, to the said administrator and administratrix of the estate of said Morris, deceased; that said claim has not been allowed by them; that said defendants have failed and refused to pay plaintiffs five per cent commission on the said sum of \$47,000, and by way of alleging the same cause of action in a different form and as a second count in said complaint, the plaintiffs reiterate, by way of reference, the first nine paragraphs of their first cause of action and allege their claim as upon a *quantum meruit*, alleging that the services so rendered for the defendants were reasonably worth five per cent on the amount for which said lands were sold. And by way of alleging the same cause of action in a different form and as a third count of the complaint, the plaintiffs reiterate the first nine paragraphs of the first cause of action, and allege that the transactions had between the defendants and said purchaser after the introduction of the purchaser to the said defendants by the plaintiffs are peculiarly within the knowledge of the said defendants, and that by the various actions of the said defendants in so making said sale to said purchaser at a sum less than had been listed by the defendants with plaintiffs for sale, the plaintiffs became and were prevented from concluding the sale with such purchaser upon the terms and for the price at which such lands had been listed with them, and that the defendants so prevented plaintiffs from completing said sale to deprive them of their commission thereon, and that by the various acts of the defendants as alleged, plaintiffs became and were damaged by a breach of the contract by defendants in the sum of said \$2,350, with interest; judgment for that sum, with interest, was prayed for.

The answers are substantially the same and put in issue the material allegations of the complaint, and set up two

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separate defenses. In the first defense, in the answer of appellant Vollmer, it is alleged that the only relation existing between the defendants was the relation arising out of, and constituted by said articles of agreement, under the name and style of the Denver Townsite Company, and denies that in the month of May, 1902, or at any other time or at all, the defendants, or any of them, either acting by or through their vice-president, Benjamin F. Morris, or by or through their secretary, Robert Schleicher, or by or through either of them, or by or through anyone at all, or by themselves or any of them, direct or otherwise, or at all, listed with the plaintiffs the lands and premises described in the complaint or any part thereof, for sale or for any purpose whatever, or employed said plaintiffs to procure a purchaser for said lands or any part thereof at any price whatever, or on any terms or conditions whatever, and denies that the plaintiffs did procure a purchaser for said lands or any part thereof; denies that they procured a purchaser who was ready or willing or able to purchase the same at any price. By said separate defense the issue is clearly made as to whether said real estate was listed with the plaintiffs for sale, and whether they procured a purchaser therefor, and the question whether said defendants Morris and Schleicher were empowered to represent the Denver Townsite Company or the members thereof other than as set forth in the said articles of agreement. It is also averred in said answer that said Denver Townsite Company never passed any resolutions or granted any authority to said Morris and Schleicher, or either of them, to list said lands with the plaintiffs for sale or to procure a purchaser therefor.

The second separate and affirmative defense of Vollmer alleges that the purchaser mentioned in the complaint was never ready or willing to purchase the land described in the complaint and pay therefor \$17.50 per acre, reserving to the vendors the crops thereon, or to purchase or pay therefor any price or sum other than the sum of \$46,240, for said land, \$5,000 of which was cash, \$11,240, with interest from August

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15, 1902, at eight per cent per annum, payable on March 1, 1903, the balance thereof, to wit, \$30,000, on or before three years from August 15, 1902, with interest at the rate of eight per cent per annum, payable annually, to be secured by mortgage on said land; that prior to the 15th of August, 1902, plaintiffs had had more than a reasonable time within which to negotiate with the said purchaser, and to cause or induce him to become ready and willing to pay for said lands the sum of \$17.50 per acre, reserving to the vendors the crops thereon for the year 1902.

The case went to trial before a jury upon the issues thus made, and resulted in a verdict in favor of the plaintiffs. A motion for a new trial was denied and an appeal was taken both from the judgment and the order denying a new trial. That appeal was submitted to this court for decision at its October term, 1905, and a decision was rendered reversing the judgment of the lower court. A petition for a rehearing was granted upon one of the points raised in the case, to wit, whether under the constitution and laws of Idaho, a joint stock association such as the Denver Townsite Company, could be legally organized or created. Oral argument was heard upon that point and quite lengthy briefs filed. It is apparent from the allegations of the complaint that counsel for the respondents considered the Denver Townsite Company a joint stock association, as it is so designated in the title of the complaint; and it further appears that this suit was brought upon the theory that said association was acting under the said articles of agreement. It further appears from the allegations of the complaint and said articles of agreement, as quoted therein, that said association was formed for the purpose of purchasing said 2,720.80 acres, and no other land, and selling the same for a profit; that said association was not organized to engage in the real estate business generally and was organized solely for the purpose of purchasing and selling said single tract of land. It is nowhere intimated that the plaintiffs were misled into believing that said association was a general partnership, and that each member thereof

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had the power to bind said partnership as may be done in merchandising or other general commercial partnerships. It would not be contended that the manager of said association had the authority under said articles to purchase other real estate or create an indebtedness, not provided for by said articles.

With those facts before us, the question is presented as to whether said association was, under our constitution and statutes, a general partnership, each member thereof having the authority and power to sell said land and otherwise bind said association as a partner may do in a general merchandising or commercial partnership. Counsel for respondents contend that said association is a general partnership, and cites in support of that contention sections 2 and 16 of article 11 of the constitution of Idaho, which are as follows: Sec. 2. "No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are or may be, under the control of the state; but the legislature shall provide by general law for the organization of corporations hereafter to be created; provided, that any such general law shall be subject to future repeal or alteration by the legislature." Sec. 16. "The term 'corporation,' as used in this article, shall be held and construed to include all associations and joint stock companies having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships."

It is contended by counsel for respondents that said sections of our constitution are peculiar to Idaho, but that is not true, as we find similar provisions in the constitutions of many of the states. The definition of a "corporation" given in section 16 is given in substantially the same language in the following cited state constitutions: N. Y. Const., art. 8, sec. 3; Cal. Const., art. 12, sec. 4; Kan. Const., art. 12, sec. 6; Ky. Const., sec. 208; Mich. Const., art. 15, sec. 11; Minn. Const., art. 10, sec. 1; Miss. Const., art. 7, sec. 16; Mo. Const., art. 12, sec. 11; Mont. Const., art. 15, sec. 18; N. Dak. Const.,

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art. 7, sec. 114; Pa. Const., art. 16, sec. 13; S. Dak. Const., art. 17, sec. 19; Wash. Const., art. 12, sec. 5; Ala. Const., art. 12, par. 241; N. C. Const., art. 8, sec. 3; S. C. Const., art. 9, sec. 1; La. Const., art. 268; and Va. Const., art. 12, sec. 1.

From a reading of said section 16, article 11 of the constitution of Idaho, it will be observed that the word "corporation" does not include, as therein defined, all joint stock companies and associations, but only such as "have or exercise any of the powers or privileges of corporations not possessed by individuals or partnerships." The provisions of that section expressly affirm that there are joint stock companies or associations that do not have or exercise any such powers or privileges, and to which the term "corporation" as used in section 16 does not apply. In said section 16 the term "corporation" is there defined only with reference to its use in said section. The definition of the term "corporation" as given in said section would not apply to the Denver Townsite Company unless it possessed or exercised some of the powers or privileges not possessed by an individual or partnerships. The constitutional definition of the term "corporation" has been held by some courts as not being a general definition, but only a definition of that term as it is used in that article of the constitution.

The supreme court of the United States, in the case of *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 693, referring to the definition of the term "corporation" as used in section 13, article 16 of the Pennsylvania state constitution, said: "The only effect of that clause is to place the joint stock companies or associations referred to under the restrictions imposed by that article upon corporations, but not to invest them with all the attributes of corporations."

In *People v. Coleman*, 5 N. Y. Supp. 394, affirmed in 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183, it was held that this provision in the constitution of New York only applied to the term "corporation" as used in the article referred to in that constitution, requiring that there should be entered after the

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word "corporation" at every place in that article the following: "All associations and joint stock companies having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships." That being the effect of this definition of the term "corporation," we will apply the various provisions of article 11 of the Idaho constitution to the Denver Townsite Company, and find wherein, if at all, the question before the court is affected thereby. The only provision of the article which counsel contends has no effect upon the organization under discussion is section 2, article 11, providing that "No charter of incorporation shall be granted . . . by special law, . . . but the legislature shall provide by general law for the organization of corporations hereafter to be created." Taking into consideration the term "corporation" as defined in said article, the language of this section would be: "No charter of incorporation, of any corporation, association or joint stock company having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships shall be granted . . . by special law, . . . but the legislature shall provide by general law for the organization of corporations and of associations and joint stock companies having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships hereafter to be created." The association under consideration is not affected by the language of section 2, article 11 for two reasons: (1) The association under consideration is not a corporation exercising any of the powers or privileges of corporations not possessed by individuals or partnerships. It is a voluntary association. To possess or exercise powers or privileges of corporations requires a sovereign grant—a franchise which said association has not and does not profess to possess. There are, however, associations and joint stock companies that have and exercise, under grant of the sovereign, powers and privileges of corporations not possessed by individuals or partnerships to which the language of the constitution is applicable. (2) Even if the association in question were an organization hav-

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ing and exercising under grant of sovereign authority, powers and privileges of corporations not possessed by individuals or partnerships, there is nothing in section 2, article 11 of the constitution that is applicable to it, since it is not operating or claiming to operate under any special law as inhibited in the first clause of that provision, and it is not violating such clause since the command of that clause is directed exclusively to the legislature to provide a general law for its organization. Such a general direction is not operative without legislative action. Cooley's Constitutional Limitations, seventh edition, 118, says: "Sometimes the constitution in terms requires the legislature to enact laws on a particular subject, and here it is obvious that the requirement has only a moral force; the legislature ought to obey it, but the right intended to be given is only assured when the legislation is voluntarily enacted."

Referring to this subject (of provisions of our constitution requiring legislative action) in *Jack v. City of Grangeville*, 9 Idaho, 291, 74 Pac. 969, this court said: "Under the provisions of said section it is the duty of the legislature to provide by law the method or means by which rates or compensation for the use of water supplied to any city or town (may be fixed)—which it is conceded the legislature has failed to do—unless it has been done by the provisions of section 2711. . . . Therefore, until the legislature provides a method for fixing rates, the contract between the parties will govern." The legislature has provided by general law only for the organization of corporations, and has not enacted a general law as commanded by the constitution for the organization of associations or companies exercising some of the powers or privileges of corporations not possessed by individuals or partnerships.

It is held in New York, in *People v. Coleman*, 5 N. Y. Supp. 394, under a constitutional provision like our own, that individuals may voluntarily organize and incorporate partnership associations without being affected by the constitutional definition of a corporation; that said definition only refers to

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those associations and companies which, under grant of statutory authority, are exercising some of the powers and privileges of corporations not possessed by individuals or partnerships; that such an association or company cannot be formed without the consent of both the sovereign and individuals forming it; that the sovereign of New York having granted such statutory authority for forming such associations, before such an association can come into existence it is necessary for some individuals to accept said grant by filing articles and otherwise complying with the statutory grant; that until the grant has been accepted, no such association or company as is referred to in the constitution has come into existence, and that the constitution does not interfere with the right of individuals in New York to voluntarily associate themselves together as an unincorporated partnership association not having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships, and that if they so associate and organize without complying with and accepting any grant of sovereignty they are an unincorporated association only, not having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships, and are outside of the provisions of the constitutional definition of a corporation.

The correctness of the foregoing analysis as given by the decision last cited clearly appears from the growth of the law upon this subject. It is stated in Cook on Corporations, volume 2, fifth edition, section 1076, as follows: "The earlier cases declaring that joint stock companies were illegal were so decided largely because of the Bubble Act, which was in force from 1720 to 1826. Very high English authority, after a thorough review of the English cases, gives the opinion that at common law joint stock associations are legal," citing Lindley on Company Law, fifth edition, 130, and commenting in note 3 on Lindley's discussion of the subject, as follows: "In a thorough and exhaustive note on this subject the learned author refers to *Rex v. Dodd* (1808), 9 East, 516, holding that a company with a prospectus limiting the lia-

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bility of subscribers is illegal, as a trap to ensnare the unwary; *Josephs v. Pebrer* (1825), 3 Barn. & C. 639, holding that unincorporated companies with transferable shares are illegal; and *Buck v. Buck* (1808), 1 Camp. 547, and *Rex v. Stratton* (1809), 1 Camp. 549, note to same effect.

The author then cites a number of cases, and says those cases contain *dicta* only so far as they passed on the legality of these companies. Then the author cites a large number of later cases, and says that they finally establish the legality of joint stock associations, and the learned jurist comes to this conclusion and says: "The case of *Blundell v. Winsor*, always relied upon as an authority by those who contend that such a company is illegal, has never met with approbation from the bench, nor has it ever been followed. Upon the whole, therefore, it appears that there is no case deciding that a joint stock company with transferable shares, and not incorporated by charter or act of parliament, is illegal at common law; that opinions have nevertheless differed upon this question; that the tendency of the courts was formerly to declare such companies illegal; that this tendency exists no longer; and that an unincorporated company with transferable shares will not be held illegal at common law unless it can be shown to be of a dangerous and mischievous character, tending to the grievance of her majesty's subjects. The legality at common law of such companies may therefore be considered as finally established."

I think it is clearly established by the decided weight of authorities that such a joint stock association as the one under consideration is clearly legal under the common law, and is not prohibited by the constitution or statutes of this state.

Theodore W. Dwight, supreme court commissioner of New York, in an article in the *Political Science Quarterly*, volume 3, page 610, 1888, in summing up the conclusions of an elaborate article on unincorporated associations, stated: "It is not a nuisance at common law for persons, no matter how many, to agree to form an unincorporated association and to issue certificates of shares representing property contributed,

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nor to make the certificates transferable either by written assignment or by delivery, nor to establish a committee having power to make rules for the government of the association. Persons doing these acts do not usurp the functions of a corporation, for the great and distinguishing feature of a corporation is the possession of such juristic qualities as to be a new, legal person, distinct from the individuals forming it. To usurp the functions of a corporation, there must be the usurpation of the qualities of a 'person,' as, for example, to sue or to be sued in an assumed corporate name."

In *Phillips v. Blatchford*, 137 Mass. 510, the court said: "It is too late to contend that partnerships with transferable shares are illegal, . . . the grounds upon which they were fairly said to be illegal in England, apart from statute, have been abandoned in modern times."

As the constitution of Idaho and the statutes of the state do not prohibit the organization of joint stock associations having transferable stock, such as the one under consideration, the common-law rule as to their legality prevails in this state. Such conditions have existed in mining districts from the earliest periods in England and in the United States. (2 Lindley on Mines, 2d ed., sec. 1430 et seq.)

The author refers to the distinctive features of such partnerships viz.: the absence of the *delectus personae*, which characterizes ordinary partnerships; that neither death nor bankruptcy of one of the members dissolves it; that the sale of a mining interest by a partner does not dissolve the partnership, and says: "The origin of this species of limited partnerships may be traceable to the early periods of mining in the west, and while it has been the subject of legislation in some of the states in recent years, such legislation is but little more than declaratory of the rules announced by the courts as governing the relations upon what may be termed the American common law of mining partnerships." (See 2 Snyder on Mines, pp. 11, 39, 40.)

In the constitution of California (1849), article 4, section 33, the term "corporation" is defined substantially the same

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as in section 16 of our own constitution, and in a number of cases in California the supreme court of that state has not considered that their constitutional provisions interfered with the organization of such unincorporated associations, as appears in its decisions from *Von Schmidt v. Huntington*, 1 Cal. 57, down to *Lowenberg v. Greenbaum*, 99 Cal. 162, 37 Am. St. Rep. 42, 33 Pac. 794, 21 L. R. A. 399.

The history of the use of this form of association is given to some extent in *Warner v. Beers*, 23 Wend. 103. Such an association as the one under consideration, not organized for engaging in the real estate business, but for the purpose of acquiring and holding title to a particular piece of real estate, is not a general business partnership. It is not a violation of the constitution or statutes for a number of people to get together to acquire a particular piece of property and place the title to the same in a trustee, whose powers and authority are definitely limited and defined and subject to instructions from the shareholders, either directly or indirectly through a board elected by the shareholders at regularly constituted meetings of the shareholders. This constitutes simply a definition of the trusts and powers subject to which a particular piece of real estate is held. The articles of association create a power of attorney to the trustee, subject to the limitations upon the powers in respect to action required either of the shareholders or directors. It is a wholesome method of co-operation which assists in bringing together and organizing small funds into a large investment.

We will next consider the distinctive features between a corporation and a partnership. In this state there is no statute granting unincorporated associations any of the powers or privileges of corporations and without such grant such associations cannot either possess or exercise any corporate franchises.

Thompson on Corporations, volume 7, section 8140, states: "The creation of a corporation is not within the power of the individuals who subscribe to its stock. It is exclusively the work of the law; . . . nor is it altogether accurate to say

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that the creation of a corporation is exclusively the work of the law; . . . the creation of private corporations is never exclusively the work of the law, but is always the concurring work of the law and private adventurers . . . by an organization, under a general enabling act already in existence."

The supreme court of New York in *People v. Coleman*, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183, in referring to the difference between corporations and such associations, said: "The one derives its existence from the contract of individuals, the other from the sovereignty of the state." In New York they have a statute authorizing the organization of joint stock associations, but it is held that such associations as do not possess or exercise powers and privileges not possessed by individuals or partnerships need not be organized under the provisions of said statute. In other words, the common-law right of individuals to make contracts not illegal or prohibited by law still remains, and has not been taken away by said provisions of the constitution.

In *Hoadley v. County Commissioners*, 105 Mass. 519, the court said: "This is a voluntary association of individuals, and its articles of agreement, although they adopt some of the forms of managing the business usual in corporations, constitute a copartnership. . . . It has none of the special attributes which belong to a corporation duly organized under our laws. . . . The provision that each member may sell and transfer his interest and thus introduce a new partner, though unusual, is not inconsistent with the contract of copartnership."

In *Warner v. Beers*, 23 Wend., at page 148, the court defines the different peculiar functions of these unincorporated associations, and designates the powers or privileges of corporations not possessed by individuals or partnerships.

The court there held that transferability of shares is not one of the powers or privileges of a corporation not possessed by individuals or partnerships; that one of the natural incidents of a corporation is to sue or be sued in its corporate

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name without the necessity of naming all or any of the individuals composing the aggregate body. Under the laws of this state the association under consideration has not the absolute right to be sued in its associate name; while in the complaint the Denver Townsite Company is named in the title, each and every of the members composing that association are also named therein and the suit is against them in person. Such an association may use a common seal and it may make by-laws by which it shall be governed. Those matters are not powers or privileges of corporations not possessed by individuals or partnerships. The court then holds that it is the settled law of England that it may be stipulated that death shall not dissolve the partnership. Under our law the partners may agree that death shall not dissolve the partnership, and such an agreement is legal and valid. In the case at bar the association has a descriptive name, but it is not used either for the purpose of suit or conveyancing. The title to said land was taken in the name of the trustee, and this suit is brought directly against the stockholders, naming them, and not against the association in its associate name. Its articles of association do not state that it is a joint stock company, but respondents have so alleged in their complaint. Its articles simply call it an association. In the Warner-Beers case, *supra*, the court discusses the matter of an exemption from personal liability of the shareholders. The doctrine laid down in that case is in harmony with the doctrine settled by the United States supreme court in the case of *Great Southern Fireproof Hotel Co. v. Jones, supra*, holding that unincorporated associations, even though organized under the statutes giving them powers to use a *company name*, in which to sue and be sued, with limited liability and corporate seals, are not corporations but partnerships within the federal statutes prescribing the jurisdiction of courts of the United States.

The only feature of the association under discussion that is material at this time; to determine whether it has powers or the privileges of a corporation not possessed by partnerships,

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is the feature of limitation of agency of the members of the association. This, we have seen, was an incident of associations under the common law resulting from the lack of the right of *delectus personae*, and not an incident of a corporation not possessed by a partnership, and may be enforced.

A corporation cannot be formed by private agreement between individuals. The franchise is possessed by the state, and even the state cannot compel people to accept its bounty. Joint stock companies may be formed without regard to the statutes, and the promoters may choose to proceed solely upon their common-law rights and responsibilities. That doctrine is laid down in *People ex rel. Winchester v. Coleman*, and it is there said: "There is in fact no statute of the state providing for the formation of joint stock companies or limiting their organization. Such companies may be said to be recognized by the acts which have been referred to conferring privileges upon them. In that sense of recognition they are authorized and sanctioned by these acts. It is, however, the common-law right of a private association which is thus organized; and as no limitation is imposed upon that right or form prescribed for its legal exercise, it is treated as coextensive with the general right to contract lawfully. . . . But the individuals so contracting may, if they see fit, ignore the statute and proceed strictly under the contract and its common-law conditions. . . . The true test is whether the being is natural or artificial. It is artificial if created by statute or called into being by compliance with statutory provisions. It is natural when solely the creature of private contract."

Morawetz on Private Corporations, volume 1, second edition, section 6, speaking of joint stock companies, says: "Their situation varies greatly, and they may be found of every possible variety from an ordinary copartnership to a corporation in the strictest sense of the word. Their real organization and character must, in each case, be determined by reference to the laws and articles of agreement under which they are formed." Such associations are styled "joint stock companies" (see 17 Am. & Eng. Ency. of Law, 2d ed.,

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636; 4 Ency. of Law & Pr. 309; 29 Century Digest, 1511 and 1512), and are sometimes styled partnerships, and they are partnerships in some respects, but from partnerships they differ in some particulars. In an ordinary partnership, unless there is an agreement to the contrary, the death or withdrawal of a member works a dissolution of the firm. In joint stock companies, however, the death of a member or the withdrawal or transfer of its interest does not involve a dissolution of the company, in which company there is no *delectus personae*. (17 Am. & Eng. Ency. of Law, 2d ed., 637, 638.) While a joint stock company is a partnership, it is different and attended with different incidents and liabilities from a partnership formed between a few individuals to carry on a business jointly and with equal powers and without transferable shares. All who have dealings with a joint stock company know that the authority to manage the business is conferred upon the directors, and that a shareholder, as such, has no power to contract for the company, and for this purpose it is wholly immaterial whether the company is incorporated or unincorporate. In 4 Cyclopaedia, 310, it is stated: "In the absence of authority specially conferred, a single member has no power to bind the association." And at page 308, it is said: "The powers and authority of the officers of an association are generally regulated by the constitution and by-laws; . . . where the officers act under special or limited powers, their action must be in strict conformity therewith, or the association will not be bound thereby." (See *Sullivan v. Campbell*, 2 Hall (N. Y.), 295.) In *McConnell v. Denver*, 35 Cal. 365, 95 Am. Dec. 107, it is held that an "unincorporated ditch company . . . differs from ordinary commercial partnership, and that a manager of such company has no power or authority to bind the company with his contracts unless duly authorized." In *Willis v. Greiner* (Tex. Civ. App.), 26 S. W. 858, it was held that where an unincorporated joint stock company, dealing in lands, vests the title in three directors and empowers them to make conveyances "subject to directions of the stockhold-

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ers," the president or secretary have no power to contract with real estate agents for the sale of land, and the association is not bound thereby, unless it has authorized the contract or ratified the same. In that opinion it is said: "Joint stock companies are generally held to be no more than ordinary partnerships, but there are distinctions which must be observed. In ordinary partnerships any member may bind the firm by his acts in the course of his business, but in a joint stock company the management of the affairs of the company may be intrusted to the officers or trustees. (11 Am. & Eng. Ency. of Law, p. 1038, note 1.) . . . The association, however, had the power to make the contract sued on and to confer the authority upon its president and secretary, but it is not shown that it ever did so." On rehearing the court said: "It was such as the president and secretary had no authority to make. There is no evidence to show that the contract was ratified by the directors." In *Appeal of the Merchants' Fund Assn.*, 136 Pa. St. 43, 20 Am. St. Rep. 894, 20 Atl. 527, 9 L. R. A. 421, Mr. Justice Williams, in setting forth some of the characteristics of such an association, said: "First, what is the legal status of the company? Second, what is the relation of the stockholders to the company? . . . The relation of the stockholders to the company is also settled largely by the articles of agreement; they contribute the capital, select the trustees who are to use and invest it, and are entitled to a distributive share of the profits made in the business. . . . They have, however, no power to use the money of the company, to interfere with its business, or to bind it in any manner. This power they have voluntarily surrendered and committed to the trustees selected by them as the agents and representatives of the company; so that the firm or company speaks not through its members as such, but through its trustees. . . . The interest of each member was therefore an interest in the profits made. He had no title to the land bought by the trustees of the company as a tenant in common or otherwise, and could neither convey nor encumber it, . . . the company was not dissolved by Oliver's

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death, and has not yet been dissolved. . . . The relation between it and the holders of its stock is, therefore, the same since Oliver's death as before." It is stated in 17 American and English Encyclopedia of Law, second edition, 638, as follows: "All who have dealings with a joint stock company know that the authority to manage the business is conferred upon the directors, and that the shareholders, as such, have no power to contract for the company." In ordinary partnerships, every partner's power to contract is coextensive for the purpose of the company, but in joint stock companies where the interest of the members is represented by transferable shares, it is well settled that a shareholder is not necessarily an agent of the company, and that their official position in the company indicates such powers only as are defined and granted in the articles of association, or as may be given by resolution of the shareholders or directors.

Counsel for respondent have cited a large number of authorities upon the question of what constitutes a partnership. We do not take issue with counsel as to the doctrine of those authorities. There are varied degrees of authority of partners to bind the partnership in the various kinds of partnerships. In a commercial or trading partnership, such as engages in trading in merchandise or in financial operations, every partner has power to execute such negotiable paper as is used in such partnership. In a nontrading partnership, however, such as a law firm or real estate or mining partnership, the members have not generally the power to execute negotiable paper. In joint stock companies the shareholders have no powers as agents, unless such powers are granted either expressly or by implication, or by acquiescence of such shareholders or association. In my view of this matter, said section 12 of the articles of association stands in no higher light as far as the extent of the power is concerned than a power of attorney defining the powers of the secretary. It is in fact a grant of power defining the authority of the secretary in making sales of said real estate. It seems to be a well-settled rule that the provisions of the articles granting

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such powers should be strictly construed. (1 Am. & Eng. Ency. of Law, 2d ed., 999.) In cases of this kind grants of power are not all the same, and when it comes to a construction of them, each must be construed according to the language of the particular power granted, and wherever the power granted is sufficiently broad to authorize the trustee or agent to appoint subagents, of course they may do so. In this case that power is reserved to the shareholders in meeting assembled, except in so far as they have in the articles of association granted specific authority to the secretary. By the provisions of said section 12, they granted authority to the secretary, subject, however, to their direction to make sales, but there is no implication that he should have authority to delegate the power to make sales. It is provided in said section 12 that purchasers are relieved from inquiry concerning the application of the purchase money, or to any directions of the shareholders, or as to the qualifications of the secretary. This is equivalent to a declaration that all other persons must inquire as to his authority.

In volume 1 (second edition) of Warvelle on Vendors, section 63, the author, in discussing syndicates and joint stock companies, among other things, says: "As a general proposition, such associations may be classed as partnerships, and to them any of the general principles of partnership are fully applicable. The articles of association will, of course, go far to determine the character which the members sustain both toward each other and to the public, but where, as is generally the case, the capital is contributed on the basis of a specific sum for each share in the enterprise, the lands purchased being held and managed for the joint account by the trustee, and the interest of the members or the shareholders is limited to a participation in whatever profits may be realized on the company's ventures, the shares are simply personal property. As a rule, the holders of such shares have no estate in or title to the land purchased by the trustee, as tenants in common or otherwise, and they can neither convey nor encumber it." The Denver Townsite Company is such

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an association as the author there refers to, and the death of one of the shareholders (the vice-president, Benjamin F. Morris) did not terminate the partnership or association. It is clearly recognized by the highest courts of many of the states and law text-writers that while some of the principles of partnership may apply to such associations, they cannot, from the very nature of the organization of such associations, be entirely controlled by the legal rules and principles that control ordinary partnerships. I conclude, therefore, under the law and said articles of association, a shareholder or officer of said association has no power or authority in regard to the sale of the land belonging thereto except that granted by the articles of association or by resolution of the shareholders. By the provisions of said section 12 of the articles of association, the secretary was prohibited from incurring any indebtedness which should exceed \$500. If he did in fact list said property with the respondents, and they procured a purchaser, he incurred an indebtedness of more than \$2,000. I therefore conclude that the Denver Townsite Company was a partnership governed and controlled, so far as the powers and rights of the shareholders are concerned, by its articles of association, and that the said Morris, as vice-president, or the said Schleicher, as secretary, had not the authority or power under said articles to list the association's lands for sale with the respondents.

The next question that we shall consider is whether the Denver Townsite Company listed said land with the respondents for sale. It is alleged in the complaint that about the month of May, 1902, the defendants, acting by and through their vice-president, Benjamin F. Morris, in the absence of their president, Henry Dernham, and acting by and through their secretary, Robert Schleicher, listed with the plaintiffs said lands and premises for sale, and employed plaintiffs to procure a purchaser therefor at a sum sufficient to pay plaintiffs five per cent commission, and net the defendants \$17.50 per acre, reserving the crops thereon, and that the plaintiffs accepted said employment and entered upon the discharge of

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their duties. It does not clearly appear from the evidence just what B. F. Morris did in attempting to list said land with the respondents. It appears that there had been some correspondence between the respondents and said Morris, but the same is not contained in the record. However, it appears that respondents wrote a letter to said Morris dated May 21, 1902, and that the appellant, Schleicher, answered that letter, which is as follows:

“Lewiston, Idaho, May 25, 1902.

“Messrs. Spotswood & Veatch, Moscow.

“Gentlemen: In reply to yours of the 21st inst. to B. F. Morris, would state that we have some 2100 acres of the land around Denver in cultivation, about equally divided between wheat and barley. A purchaser could not get possession before next fall, after harvest is removed, nor would we expect to give him any part of the crop of this year. The terms would be \$17.50 per acre, net to us, including the part of which town lots have been, as a full 160 acres, or not taking that 160 at all, as purchaser might prefer. I am aware that Mr. M. let you understand that your 5 per cent commission would come out of the \$17.50, which I also was willing to do, but Messrs. V. & S. are not anxious to let go at all, and state that unless they can get \$17.50 clear of commission, they will not consent to a sale. Terms of payment could be arranged to some extent to suit purchaser's convenience, but should require one-half of price down.

“Yours truly,

“R. SCHLEICHER.”

It appears from that letter that Morris had let respondents understand that they should have five per cent commission, provided they procured a purchaser at \$17.50 per acre, and that the secretary was agreeable thereto. But two of the respondents would not consent to that arrangement and insisted on \$17.50 per acre net. Respondents did not reply to Schleicher's letter of May 25, 1902, and did not signify in any way their acceptance of the proposition stated in that letter, unless it be the letter of introduction of Mulhall to

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Morris dated May 31, 1902, hereinafter quoted. Conceding that said acts of Morris and Schleicher amounted to a listing of said land for sale with respondents, the question arises whether they had the authority to list it. The minutes of the appellant association are contained in the record, and no resolution is found therein which authorizes Morris or Schleicher to so list said land. Then, did the appellant association ratify such listing? We find no evidence whatever in the transcript even tending to show that they did so.

Counsel for respondents has taken two positions in this case: First, that said association is a general partnership; second, that it is a corporation exercising and possessing powers and privileges not possessed by partnership. It is clear to us, under our law, that it is a partnership, but not a general partnership wherein each of the partners has plenary power to sell and otherwise dispose of the property of the association or purchase other land, or create indebtedness beyond that provided for in the articles. Under the constitution and laws of this state there is nothing prohibiting individuals from entering into such a contract as said association entered into. While the legislature, no doubt, has the power to prohibit such an agreement, it has not done so, and as heretofore shown under the common law, individuals may legally enter into such a contract; therefore such contracts are legal. I therefore hold that said contract of association was a valid and binding contract. It is nowhere alleged or shown that the plaintiffs were misled in any way in said matter. They knew of the agreement between the appellants, and that under the terms of said agreement the individual members of said association had no power or authority to list said land with them for sale. The complaint does not allege that respondents were misled or deceived into believing that said association was a general partnership, and that the shareholders had the powers of agency possessed by partners in a general partnership. This disposes of the case. But it is contended by counsel that respondents procured a purchaser, and I shall consider that question.

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After Schleicher had written said letter of May 25th, nothing further was written, said or done in regard to the matter, so far as the record shows, until May 31, 1902, when in the morning of that day William Mulhall, of Sioux City, Iowa, went to the office of respondents in the city of Moscow, Idaho, and they gave him the following letter:

“Moscow, Idaho, May 31, 1902.

“Hon. B. F. Morris, Lewiston, Idaho.

“Dear Sir: This will introduce Mr. Wm. Mulhall, of Sioux City, Iowa, who is on his way to Denver for the purpose of examining the company's property with a view of purchasing and locating a colony. We have also given him a description of two other pieces of land, your No. 35 and No. 36. You know these lands better than we do, so you will please go into details with him, and tell him all about the Camas Prairie country. If he is pleased with the country and price is satisfactory, he will want to buy considerable more land than that owned by the company. Show him everything you have. Any attention shown Mr. Mulhall will be appreciated by

“Yours truly,

“SPOTSWOOD & VEATCH.”

It will be necessary to go back a little and show the facts and circumstances that caused Mulhall to come to Idaho and call on respondents at the time they gave him said letter. Mulhall was engaged in the real estate business at Sioux City, Iowa, and in April, 1902, he received a letter from said B. F. Morris that contained a printed list of forty-four different tracts of land that said Morris was advertising for sale, which tracts were numbered from 1 to 44, inclusive. In said printed list sent to Mulhall the tracts numbered 34, 35, 36 and 37 were inclosed with ink pen marks. Number 34, was the 2,720.80 acres referred to in this suit, and No. 37 was 2,700 acres of land near Pomeroy, state of Washington. That advertisement No. 34 is as follows: “No. 34—2720 80-100 acres in compact body, fine black loam, bunch grass land, in

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center of Camas Prairie; town of 75 inhabitants, church, stores, roller mill, postoffice and shops; fine four room school-house near center of the tract; . . . it is ten miles from Grangeville and ten miles from Cottonwood on main stage road, 16 miles from terminus of railroad. . . . Price \$20.00 per acre." The letter from Morris and said list first called Mulhall's attention to said land.

William Mulhall testified as follows: "No, sir; I had no communication from Messrs. Spotswood & Veatch, either oral or written, at any time, calling my attention to this 2,720 acres of Denver Townsite property before I received that communication from B. F. Morris. I had not even seen any advertisement of this Denver Townsite property of any kind prior to the time I received this real estate circular from Benjamin F. Morris, deceased. The two thousand seven hundred and twenty and a fraction acres of land described in this B. F. Morris real estate circular, answers the description of the Denver Townsite property which I bought. . . . I left Sioux City, Iowa, and came west to look at this property on or about the first Tuesday in May, 1902. The main object of my trip west at that time was to see this land; the Denver land. I met Messrs. Spotswood & Veatch about the last of May, 1902, when I was coming to this part of the country to see these Camas Prairie lands, and on my road here I came by the way of Colfax and Moscow, and then here. After arriving at Colfax I found I had to wait there for several hours; that same evening I arrived at Moscow, stayed there all night, and on the following day I had to wait until noon or a little after to get a train here. While in Moscow I happened into their office, made some inquiry about the Denver land and the country in general, and that is the first time that they have said a thing about those lands, and he suggested giving me a letter of introduction to Mr. Morris, and so I took the letter. That is the letter that has been referred to here as the letter of introduction of myself from Spotswood & Veatch to Mr. Morris." Q. "And your main object in coming west was to see the lands here in Idaho, was it?" A. "Yes,

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sir." Q. "Why didn't you go to see the 2,700 acres over close to Pomeroy?" A. "I could answer that by going into a little detail. . . . When I arrived at Pendleton I visited a friend there, a farmer who had been in Camas Prairie shortly before that, and he encouraged me to go on to that country and said it was the best country. The description of the soil is what gave me the preference."

The 2,700 acres of land close to Pomeroy above referred to was a tract of land advertised for sale as number 37 of the circular sent to Mulhall by B. F. Morris. It seems that the said Morris had that tract of land listed with him for sale. Mulhall further testified that he had an uncle living near Moscow, whom he had lost track of, and when he arrived there he endeavored to locate him, and his landlord at the hotel referred him to a gentleman sitting in the office by the name of McGowan. McGowan could give him no information in regard to his uncle, but informed Mulhall that the respondents, the firm of Spotswood & Veatch, were well acquainted there, and they probably could give him some information about his uncle. During that conversation he informed McGowan where he was from and where he was going, and talked to him in regard to the Camas Prairie country. McGowan informed witness that he would go with him the following morning to the office of respondents, and on the following forenoon, while witness was visiting with a party of acquaintances from Iowa who had just returned from a trip to the Camas Prairie country, McGowan came up and asked witness to go to the office of Spotswood & Veatch with him. He thereupon went and was introduced to Spotswood and Veatch, and they introduced witness to some old gentleman there, who was an old-timer, with whom he talked about the country and about his uncle, and it appears that he also talked with Spotswood and Veatch in regard to the Camas Prairie country. Witness informed them of his mission there and they stated to him that Mr. B. F. Morris was an old acquaintance of theirs, an old associate, and a very reliable man to deal with, and spoke very highly of him, and stated to Mulhall that they would give him a letter of intro-

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duction to Morris, and thereupon they prepared the letter, which is the letter above set forth, dated May 31, 1902. Mulhall on that day proceeded to Lewiston and there met Mr. Morris and handed him the said letter of introduction. On cross-examination, the witness testified as follows: Q. "Then why did you get a letter of introduction from Spotswood to Morris when you claim you didn't know Spotswood?" A. "Why, he volunteered the letter." Q. "What was the conversation that led up to his giving you the letter of introduction?" A. "Inquiries which I made about the country. . . . You understand I was coming out here to see the country and wanted to learn all I could. I might have asked a hundred questions or more; I couldn't recollect them at this time." Q. "You won't deny that he didn't draw your attention to those lands?" A. "I think I drew his attention to the lands." Q. "Then Mr. Mulhall, if you were coming to Lewiston to see Mr. Morris, what did you ever deliver that letter to him for?" A. "Why, I delivered it as a matter of courtesy to Spotswood & Veatch. I would not intentionally promise a man to do a thing and not do it."

After Mulhall delivered said letter of introduction to Morris, he had an interview with him at which appellant Schleicher was present, and it appears at that interview Morris offered the said lands to Mulhall for \$17.50 per acre, reserving that year's crops. That interview with Morris occurred on the evening of the 31st of May, or first day of June, 1902, and Mulhall proceeded to Camas Prairie to examine said tract of land. It is also shown that B. F. Morris was taken suddenly sick and died on the 4th of June, 1902. After examining the land, Mulhall returned to Lewiston and had further negotiations with the respondent Schleicher, who was the secretary of the said association, and made him an offer of about \$40,000 for the land, which was declined. Thereafter Mulhall left Lewiston on his way home by the way of Portland, and when he arrived at The Dalles he called said Schleicher up by 'phone and inquired of him what their decision was in regard to his offer for the land. Schleicher replied that they declined it. Nothing further was done in

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regard to the matter until July 8th, when Mulhall wrote the following letter to the respondents:

“Sioux City, Iowa, July 8, 1902.

“Spotswood & Veatch, Moscow, Idaho.

“Dear Sir: In compliance with your request when at your office, I desire to say that I did not make a deal with Mr. Morris for the land at Denver. In fact, I had arranged with him to go and see the land, but he was suddenly taken sick, and died in a day or two. However, I saw the land during my stay in that neighborhood, and while there appears to be some very good lands in the tract, yet I fully believe there is three hundred acres practically worthless. If the same could be obtained at about \$12.50 per acre, I think I would purchase it. There are plenty of other lands in smaller tracts in that neighborhood that could be had at that price. I expect to return to Oregon sometime during this month, with a party of land customers, and after getting through with them, I hope to return by the way of Moscow, at which time I would like to purchase some land, therefore would be glad to receive description and prices of your best bargains.

“Yours very truly,

“WILLIAM MULHALL.”

The respondents' reply to said letter is as follows:

“Moscow, Idaho, July 14, 1902.

“William Mulhall, Esq., Sioux City, Iowa.

“Dear Sir: We are in receipt of your favor of the 8th inst. The 2720 acres, including the Denver Townsite cannot be bought for a less price than we made you when here.

“We are well acquainted with every acre of this land, and know you are way off when you think there are 300 acres of it practically worthless. 125 to 150 acres might be so classed, but that carries a stream of water which adds very much to the value of the balance of the land. We have very little low priced land in this county that is good. We have sold an enormous amount of land since you were here, and the prices are steadily advancing. If you come this way on

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your return from Oregon we will be glad to show you what we have.

“Yours truly,

“SPOTSWOOD & VEATCH.”

Mulhall returned to Idaho in the fore part of August, 1902, and again went out and examined the land. On his second trip he had another interview with Schleicher and he priced said lands to him at that time at \$20 per acre, and after some negotiations he sold the lands to Mulhall for \$46,240, that being a little less than \$17 per acre; \$5,000 of the purchase price was paid in cash, and \$11,240 thereof was to be paid on the first day of March, 1903, and the balance of \$30,000 was to be paid on or before three years from August 15, 1902, with interest on deferred payments at the rate of eight per cent per annum. Mulhall had not seen either of the respondents from the time he met them in Moscow on May 31, 1902, until some time after the sale was made on the 15th of August, 1902.

Mulhall testified that he was never ready or willing to pay \$17.50 per acre for said lands, and the evidence shows that the appellants had not offered the land to him for less than \$17.50 per acre until the 15th of August, when he declined to give them to exceed \$17 per acre, and they accepted that offer. These facts show that the appellants received for said land every dollar that Mulhall would pay therefor—was ready and willing to pay therefor. It must be borne in mind here that it is alleged in the complaint, and admitted that if the land was listed at all with the respondents it was listed as follows: The appellants were to receive a net of \$17.50 per acre for the land and reserve the crops growing on the lands in the year 1902. It is alleged in the complaint, and contended by counsel for respondents that they had procured a purchaser for said land on the terms last stated, but the evidence is clearly against that contention. The evidence shows that Mulhall was never ready or willing to pay to exceed \$17 per acre for said land. Conceding, for the purposes of this case, that said lands were listed for sale

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with the respondents by appellants, respondents failed to show that they had procured a purchaser who was ready and willing to pay the list price for said land. There is nothing in the record showing, or tending to show, that the appellants have in any manner attempted to overreach or beat the respondents out of any commissions that they were entitled to receive because of their procuring a purchaser for said lands. In fact, the evidence shows that B. F. Morris was a real estate agent himself; that he advertised largely and sent printed lists of the lands that he had for sale over the country, and that he sent one of those lists to Mulhall, the purchaser, and that that advertisement first called Mulhall's attention to the land. Mulhall did not know of Spotswood and Veatch until he had reached Moscow, Idaho, on his way to examine said lands, and there accidentally met them. On making inquiry for an uncle that he had lost trace of, he was referred to the respondents as old residents, and having a wide acquaintance in and about Moscow, and he informed them of the purpose of his visit to Idaho, and they gave him a letter of introduction to B. F. Morris. Under that state of facts it is clear that they did not call Mulhall's attention to this land, but that B. F. Morris did so.

It is contended by counsel for appellant that it was the letter of July 14th that made Mulhall "ready and willing" to pay for said land the list price, to wit, \$17.50 per acre, reserving that year's crops and five per cent commission for the respondents. I cannot agree with counsel on that point. The difficulty is, the uncontradicted evidence shows that he was not ready and willing to pay said price or that they induced him to purchase said land. The record shows that the respondents are keen, shrewd business men, and that they procured the very largest price that it was possible to procure from said Mulhall for said lands. The respondents certainly had confidence in the business ability of the appellants, as they paid no attention whatever to Mulhall after giving him the letter of introduction to Morris dated May 31, 1902, until they received his letter of July 8th.

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To recapitulate: Mulhall, the purchaser, had, in April, 1902, received a letter from B. F. Morris containing a circular list of land, which list called the particular attention of Mulhall to the Denver Townsite Company land, and in response thereto, he left his home in Sioux City, Iowa, and traveled about two thousand miles on his way to inspect said land, and went into the office of the respondents at Moscow, Idaho, to make inquiry in regard to an uncle whom he had not heard from for years, and while there informed the respondents of his mission to see B. F. Morris and inspect said land. Respondents thereupon informed him that they were well acquainted with Morris and would give him a letter of introduction to him, which they did. Can it be contended with any reason under that state of facts that respondents procured Mulhall as a purchaser? He had concluded to go and inspect said land more than a month before he met respondents, having had his attention called to it by B. F. Morris, and had proceeded about two thousand miles on his way to see the land before he accidentally, or incidentally, met respondents.

Those are the undisputed facts. Respondents were informed by Mulhall that he was on his way to see said land. The giving of said letter of introduction was a work of supererogation, and for the evident purpose of laying the foundation for a commission.

The respondents had no more right to appropriate as their own a purchaser found by appellants than appellants had to appropriate one found by respondents, provided the land had been listed with them. There must be a little honor between real estate agents. If Mulhall's attention had been called to this land by respondents, no court would permit appellants to appropriate him as their own purchaser; neither will respondents be permitted to claim as their purchaser one procured by appellants (provided the sale was not brought about by the efforts of respondents).

Mulhall evidently was a keen, shrewd man—a real estate agent—and his letter of July 8th indicates to me that he had

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concluded to purchase said land, and the letter of respondents of July 14th to him did not influence him to make the purchase. It is sufficient to say that Mulhall was a purchaser procured by Morris, now deceased, and not by respondents.

The judgment is reversed and the cause remanded, with instructions to dismiss the action.

Costs are awarded to appellants.

Stockslager, C. J., concurs.

AILSHIE, J., Dissenting.—I agree with my associates in much that is said in the very exhaustive opinion by Mr. Justice Sullivan, and still I find much there said that I cannot agree with. This is the second hearing of this case and the second opinion filed. I expressed my view on the original hearing as to the powers and authority of the secretary and trustee of this association, and also expressed doubts as to whether such an association can lawfully exist under our constitution and enjoy any rights, privileges or immunities other than or superior to those enjoyed by partnerships and individuals. I have had no occasion to change my mind on this matter since the first hearing. It is clear, however, to the merest layman that the majority of the court have given recognition to a hybrid business organization—half corporation, half partnership. For the purpose of avoiding liability when creditors pursue it, we are assured that it enjoys such of the powers and privileges of a corporation that its partners are not liable for debts incurred by its officers and agents unless specially authorized by a meeting of the shareholders, nor are they liable for debts incurred by partners (or “shareholders,” as they please to call themselves). On the other hand, when confronted with the necessity of incorporating under the law before exercising or enjoying any of the privileges or functions of or common to a corporation, we are told they are merely a “limited or special partnership.” Such an easy, elusive and facile organization, without identity or conscience, will render the much hated corpo-

Points Decided.

ration a mere dwarf in the sight of such manifestations of power and immunity from liability. Aside from being entirely useless and unnecessary, it would be equally as tedious and laborious (far beyond the time at my disposal) for me to undertake to go through and point out wherein I agree and where disagree with the opinion of the majority. I will content myself by saying I concur in part and dissent in part.

(June 13, 1906.)

A. T. SPOTSWOOD et al., Respondents, v. HENRY DERNHAM et al., Appellants.

[85 Pac. 1108.]

LIMITED PARTNERSHIPS—SERVICE OF SUMMONS ON PART OF THE PARTNERS—JUDGMENT AGAINST THOSE WHO WERE NOT SERVED.

1. Where an action is begun upon the theory that the defendants compose a voluntary unincorporated joint stock company, and that the service of summons must be made upon each and every of the defendants to give the court jurisdiction, when the clerk of the court, through inadvertence or otherwise, enters judgment against the unserved defendants, on appeal such judgment will be set aside.

2. In such case, where the partners served with summons appeal, that appeal inures to the benefit of the unserved partners, provided the service of summons on one partner is sufficient service on all of them.

(Syllabus by the court.)

APPEAL from the District Court of Second Judicial District for Nez Perce County. Hon. Edgar C. Steele, Judge.

Action to recover commission for sale of real estate. Judgment for the plaintiffs. *Reversed.*

James E. Babb and Daniel Needham, for Appellants.

I. N. Smith, for Respondents.

Submitted on the same briefs as the case of *Spotswood v. Morris*, ante, p. 360, 85 Pac. 1094.

Opinion of the Court—Sullivan, J.

SULLIVAN, J.—This is an appeal by the defendants Dernham, Kauffman and Scott, from the judgment rendered by the trial court in the case of A. T. Spotswood et al., against John B. Morris, as administrator of the estate of Benjamin F. Morris, deceased, et al. This is the same case reported *ante*, p. 360, 85 Pac. 1094, and reference is made to that case for the facts on this appeal. The title to the case is given in the complaint as follows:

“A. T. Spotswood and Fred Veatch, Partners as Spotswood & Veatch, Plaintiffs, v. John B. Morris, as Administrator of the Estate of Benjamin F. Morris, Deceased; Harriet F. Morris, Administratrix of the Estate of Benjamin F. Morris, Deceased; Henry Dernham, William Kauffman, John P. Vollmer, Wallace Scott and Robert Schleicher, Trading and Doing Business as The Denver Townsite Company, a Voluntary Unincorporated Joint Stock Company, Defendants.”

In the decision by this court on the appeal above referred to, the court held that the Denver Townsite Company was a limited partnership, regulated and controlled by its articles of association, and the plaintiffs refer to it in the title of the case as “The Denver Townsite Company,” a voluntary unincorporated joint stock company. While it was contended finally by counsel for respondents that said association was only a general partnership, the case apparently was not tried upon that theory. Service of summons was never made upon the defendants Dernham, Kauffman and Scott, and there was no appearance in the case for them; but regardless of that fact, a judgment was entered against them, which would have been proper had they been general partners with the other defendants, and in the determination of this matter it may be considered that the service on one partner was a sufficient service on all of them. If that be true, the appeal of Vollmer, Schleicher and the administrator of the Morris estate was an appeal for the entire partnership, and the judgment of the trial court against them must be set aside and the action dismissed on the same grounds for the same reasons given in

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our decision in the former case. Taking the other view of the matter, that in order to get jurisdiction of Dernham, Kauffman and Scott they should have been served with summons, as they were not, the court had no jurisdiction to enter judgment against them, and for that reason the judgment must be set aside.

It seems clear to me from the record in this case that the clerk inadvertently entered judgment against all of the defendants, when the theory on which the case was commenced seems to have been that service of summons must be made on each of the defendants. The judgment, as entered, recites the fact that James E. Babb and Daniel Needham appeared as attorneys for the defendants, when, as a matter of fact, they did not appear for said Dernham, Kauffman and Scott, unless it be held that by appearing for the administrator of the Morris estate and Vollmer and Schleicher, they thereby appeared for all the defendants. But, as above stated, I do not understand that the case was tried upon the theory that the Denver Townsite Company was a general partnership, and the papers show that Messrs. Babb and Needham only appeared for a part of the defendants. While the judgment itself does not name any of the defendants, it does recite as follows: "Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiffs have and recover from said defendants the sum of \$2,683.33," etc. If Messrs. Babb and Needham appeared for all the defendants, the judgment must be set aside as to all of the defendants, and if they only appeared for the administrators of the Morris estate, Vollmer and Schleicher, the court had no jurisdiction to enter judgment against the other defendants, and the judgment must be set aside, and it is so ordered. The case is remanded to the trial court, with instructions to dismiss the action. Costs are awarded in favor of the appellants.

Stockslager, C. J., concurs.

*Opinion of the Court—Ailshie, J. Concurring.

AILSHIE, J., Concurring.—I concur with the opinion of Mr. Justice Sullivan in this case. To my mind, this opinion rests on the true and only legal basis on which it can be founded, and does not depend for its justification on the theory that a joint stock company or association is a peculiar organization that may exercise powers and enjoy privileges and immunities not exercised or enjoyed by individuals or partnerships. There is neither reason nor any sound law against a business association calling itself a joint stock company, but such organization is nothing more nor less than a partnership—special if formed in compliance with chapter 1, title 11, of the Civil Code; otherwise general, though limited to a specific business or transaction. I do not understand that counsel for respondent has ever contended otherwise. He does urge, however, that while they were a partnership he has so prosecuted his action against them as to hold both the partners as such, and also all the members personally on whom he secured personal service. If his position is correct, it would still be true that he could take no judgment against any individual not served, and on the other hand, a reversal of his judgment against the partnership on the appeal of any member thereof must necessarily inure to the benefit of all the partners. His judgment against Dernham, Kauffman and Scott must, therefore, fail, whether it be considered a judgment against them as individuals or against the partnership.

Argument for Appellants.

(June 14, 1906.)

ALBERT T. RYAN, Trustee, Respondent, v. WALTER A.
ROGERS et al., Appellants.

[86 Pac. 524.]

QUESTIONS FOR JURY AND COURT—STIPULATION AS TO QUESTIONS SUB-
MITTED TO COURT AND JURY.

1. Where a chattel mortgage was given on a stock of merchandise, and the mortgagor thereafter went into bankruptcy, and the mortgagee proceeded to foreclose his mortgage, and suit was thereafter brought against the mortgagee and sheriff to recover the value of the property seized and sold in such foreclosure proceedings, and it was stipulated by respective counsel that the question as to the value of the property so seized and sold should be submitted to a jury, and that in case the court found the mortgage was void as against the plaintiff, judgment should be entered in his favor and against the defendants for the full amount of the value of the property as found by the jury, otherwise, judgment to be entered for the defendants, and the jury found the value of the property to be \$2,400; and the court found that the mortgage was valid, judgment should have been entered for the defendants.

(Syllabus by the court.)

APPEAL from District Court of the Sixth Judicial Dis-
trict for Bingham County. Hon. James M. Stevens, Judge.

Action to recover the value of property sold under fore-
closure of chattel mortgage. Judgment for the plaintiff. *Re-
versed.*

F. S. Deitrich and John W. Jones, for Appellants.

Litigants are at liberty to prescribe the issues to be tried and modify and limit the issues made or to be made by the pleadings, or to waive the issues made by the pleadings on file and stipulate for a trial on the merits, regardless of such issues. (20 Ency. of Pl. & Pr. 619; *Bingham v. Winona*

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County, 6 Minn. 136; *Muir v. Preferred Acc. Ins. Co.*, 203 Pa. St. 338, 53 Atl. 158; *Crosby v. Security Mut. Life Ins. Co.*, 83 N. Y. Supp. 140, 86 App. Div. 89.)

G. F. Hansbrough and Hawley, Puckett & Hawley, for Respondent, cite no authorities on the point decided.

SULLIVAN, J.—This action was commenced by Albert T. Ryan, trustee in bankruptcy of the estate of Peter Van Blaricom, against Walter A. Rogers and also Peter A. Steers, as sheriff of Bingham county. By this action plaintiff sought to recover from the appellants \$3,000, the alleged value of the stock of merchandise which the respondent, as trustee afore-said, claimed belonged to said Van Blaricom, and which it is alleged the appellants wrongfully converted to their own use.

The answer contains a specific denial of all the allegations of the amended complaint; and further answering they allege that the appellant Steers was, at the dates mentioned in the complaint, sheriff of Bingham county, and that on the twenty-first day of July, 1903, the said Van Blaricom was indebted to the appellant Rogers in the sum of \$1,500, and to secure the payment of the same he executed and delivered to said Rogers a certain chattel mortgage upon the identical stock of goods, wares and merchandise referred to in the amended complaint that sets out particularly the terms of said chattel mortgage; that after paying the interest upon said indebtedness for the first quarter, said Van Blaricom failed and neglected to pay any of or further interest thereon; and that pursuant to the terms of said mortgage, the said Rogers declared the whole of said indebtedness due and payable, and thereupon, on the eighth day of July, 1904, proper proceedings were brought as provided by law for the foreclosure of said mortgage; and that thereupon the appellant Steers, as sheriff, took possession of the property described in said mortgage and proceeded according to law to make a sale thereof to satisfy the indebtedness secured by said mortgage; that thereafter, and before the sale of said property took place,

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the said sheriff was enjoined from selling said property, and thereafter said injunction was dissolved and the sale of said property was made by the sheriff of said county for the sum of \$1,835; that at all times mentioned in said amended complaint said mortgage was a valid and existing lien upon the property described therein, and that in seizing and selling said property the appellants fully complied with the law in such cases made and approved. The issues being thus made, the following stipulation was entered into before the trial of the case began: "It is hereby stipulated that a special question shall be submitted to the jury in answer to which they shall find simply the value of the property seized and sold by the defendants, and there shall be submitted to the court, upon the evidence, the question whether or not the chattel mortgage in controversy, under the circumstances shown by the evidence, was void as against the plaintiff at the time of the plaintiff's appointment as trustee, the court to take into consideration the fact of actual possession by the defendants of said property at said time, and if the court find that said mortgage was at said time void as against the plaintiff, and further find the defendants had no valid lien as against the trustee by reason of such possession, judgment shall be entered in favor of the plaintiff and against defendants for the full amount of the value of said property as found by the jury; otherwise, judgment to be for said defendants." Thereafter a jury was impaneled, and under said stipulation one question was submitted to them, and that was "the value of the property seized and sold by the defendants." The jury found the value of said property to be \$2,400. The court thereupon proceeded to try the other issues made by the pleadings, and made its findings of fact and conclusions of law and entered judgment thereon, wherein and whereby it was adjudged that the respondent, trustee, have and recover of and from the appellants the sum of \$2,100, with interest thereon and costs of suit. This appeal is from that judgment. A number of errors are assigned, the first of which is that the court erred in not ren-

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dering judgment in accordance with said written stipulation made by counsel for the respective parties. It appears from their stipulation that three questions were submitted for determination: one to the jury—two to the court. The jury was required to and did find the value of the property so seized and sold by the appellants to be of the value of \$2,400. The first question submitted to the court by said stipulation was whether or not the chattel mortgage in controversy, under the facts and circumstances shown by the evidence, was void as against the plaintiff at the time of plaintiff's appointment as trustee, and in determining that question the court, under the terms of said stipulation, was to take into consideration the fact of the actual possession by the defendants of said property at said time; and, second, if the court should find that said mortgage was at said time (date of appointment of trustee) void as against the respondent trustee, and further find that the defendants had no valid lien as against the trustee by reason of such possession, judgment should be entered in favor of the respondent and against the appellants for the full amount of the value of said property as found by the jury; otherwise judgment was to be rendered and entered for the appellants. The stipulation requires that the judgment be absolutely for the defendants, unless the court found, as a matter of law, that the chattel mortgage was void as against said trustee; and also that the appellants had no lien upon said property by virtue of their possession thereof. In other words, if the court found that said mortgage was void as against the trustee, judgment should go in his favor for the full value of said property. But if the court found it valid as against the trustee, judgment was to go against him for the full value of the property found by the jury.

We conclude, under said stipulation and the findings of the court on the question submitted to it, that judgment should have been entered for the appellants. The court found that the mortgage was a valid mortgage as to a part of the property that had been seized and sold by the sheriff

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under said chattel mortgage foreclosure proceedings. By the terms of said stipulation the court was not authorized to determine the value of the merchandise actually included in said mortgage, but was only authorized to determine the question of the validity of said mortgage. No doubt respective counsel considered that it would be very difficult to segregate the articles of merchandise that were in the store building occupied by the mortgagor at the time he executed said mortgage, and the articles that he had purchased thereafter and intermingled with those that he had mortgaged. While the judgment of the trial court may be equitable, it is not in accordance with said stipulation, and the terms of the stipulation must control. The judgment must be reversed and the cause remanded, with instructions to enter judgment for the defendants. Costs of this appeal are awarded to the appellants.

Stockslager, C. J., and Ailshie, J., concur.

ON REHEARING.

(July 18, 1906.)

STOCKSLAGER, C. J.—Counsel for respondent has filed a lengthy petition for a rehearing in this case, insisting—1. "That the chattel mortgage in controversy is void *ab initio*; 2. That it was the intention of the trial judge to find the said chattel mortgage void *in toto*; 3. That the finding of the trial judge for the plaintiff in the sum of less than \$2,400, the value of the property as found by the jury, was for the purpose of reducing the damages to the amount of the original stock of goods upon which the said mortgage was once a lien, and was within the equity jurisdiction of the court, even though the court found as it did, or intended to find the mortgage invalid."

It seems to be conceded by all parties that by the terms of the stipulation entered into before the trial, but one question was to be submitted to the jury, and that was: "What was the value at the time and place said sale was

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made of the goods taken by defendant Steers as sheriff, under the mortgage in question on the eleventh day of August, 1904?" A. "\$2400 (Twenty-four hundred dollars). H. C. Dippel, Foreman."

It would seem from the stipulation that an answer to this question was to bind all parties to the litigation as to the actual value of the goods, and the court was also required to accept the finding of the jury on this question as final. After this question was determined by the jury the stipulation required the court to find whether the chattel mortgage was void as against the plaintiff at the time of the plaintiff's appointment as trustee. And if the court find that said mortgage was at said time void as against the plaintiff, and further find the defendant had no valid lien as against the trustee by reason of such possession, judgment shall be entered in favor of the plaintiff and against defendants for the full amount of the value of said property as found by the jury; otherwise judgment to be for defendants. By the terms of this stipulation, whether equitable or otherwise, the issues were narrowed down to practically two questions: 1. The jury should determine the value of the goods; 2. The court should determine whether the chattel mortgage was void as against plaintiff as trustee, and judgment should follow the two findings. The finding of the jury is plain and unequivocal, but the findings of the court are not in strict conformity with the stipulation.

On a further consideration of the record, we conclude that this case should be remanded to the lower court, with instructions to make findings of fact and conclusions of law in harmony with the stipulation and finding of the jury, and order judgment according to such finding and conclusions, and it is so ordered. Costs awarded to appellant.

Ailshie, J., and Sullivan, J., concur.

Points Decided.

(June 16, 1906.)

In the Matter of the Estate of JOHN D. PAIGE, Deceased.

[86 Pac. 273.]

PROBATE OF WILL—ORDER REFUSING, APPEALABLE—NONAPPEALABLE ORDERS, HOW REVIEWED—RECORD OF APPEAL—MINUTES OF COURT—BILL OF EXCEPTIONS—UNDERTAKING ON APPEAL—SPECIFICATION OF GROUNDS OF MOTION—APPLICATION TO AMEND UNDERTAKING.

1. Under the provisions of section 4831, an order by the probate court refusing to admit a will to probate is appealable.

2. All interlocutory and nonappealable orders of the district court made prior to judgment may be reviewed on appeal from the judgment, provided they are properly presented by the record.

3. Under the provisions of section 4819, Revised Statutes, an appeal to the supreme court from the judgment of the district court rendered on an appeal from the probate court, the appellant must furnish this court with a copy of the notice of appeal, of the judgment or order appealed from, and of all papers used on the hearing in the court below, and the copies of such papers must be certified to be correct by the clerk or the attorneys.

4. Under the provisions of said section 4819, the minutes of the court are not required to be furnished to the appellate court, and to properly present such minutes, they should be preserved by bill of exceptions.

5. Where there is a motion to dismiss an appeal on the ground of defects in the undertaking, the motion should specify the particular defect complained of; but in case it does not, and is presented and argued by the respective counsel as though it were sufficient, the question of sufficiency of the specification cannot be raised for the first time in this court.

6. An application to amend an undertaking on appeal must be made before the motion to dismiss the appeal has been granted.

(Syllabus by the court.)

APPEAL from the District Court of the Third Judicial District for Ada County. Hon. George H. Stewart, Judge.

Proceedings for probate of will. Application denied. *Sustained.*

Argument for Appellants.

Edwin Snow and Harry S. Kessler, for Appellants.

The notice of motion should specify with particularity the precise grounds upon which the moving party will base his right to the relief sought, and a noncompliance with this rule is a sufficient ground for denying the motion. (14 Ency. of Pl. & Pr., 136, and cases cited; *Estee's Pleading*, 4th ed., sec. 4401; *Sawyer & Briggs v. Schoonmaker*, 8 How. Pr. 198; *Bailey & Southard v. Lane*, 21 How. Pr. 475; *Perkins v. Mead & Brook*, 22 How. Pr. 476; *State v. Fry*, 10 Mont. 407, 25 Pac. 1055; *Donnelly v. Struven*, 63 Cal. 182; *Freeborn v. Glazer*, 10 Cal. 337; *Loucks v. Edmondson*, 18 Cal. 203; *De Stafford v. Garley*, 15 Colo. 32, 24 Pac. 580; *Omaha Uphol. Co. v. Chauvin-Fant Furn. Co.*, 18 Mont. 468, 45 Pac. 1087; *Schofield v. Pope*, 103 Ill. 138; *Archer v. Long*, 35 S. C. 585, 14 S. E. 24; *Garret v. Kansas City Coal M. Co.*, 111 Mo. 279, 20 S. W. 25; *Cason v. Laney*, 82 Tex. 317, 18 S. W. 667; *Succession of Theriot*, 114 La. 611, 38 South. 471; *McDermid v. Judge*, 122 Ga. 28, 49 S. E. 809; *Herman v. Hutchinson*, 33 Or. 239, 53 Pac. 489; *State v. Estes*, 34 Or. 196, 51 Pac. 77, 52 Pac. 576, 55 Pac. 25; *Healy v. Seward*, 5 Wash. 319, 31 Pac. 874; *Payne v. Spokane Street Ry. Co.*, 15 Wash. 522, 46 Pac. 1054, 3 Cyc. 195, 196; *Bernard v. Sloan*, 138 Cal. 746, 72 Pac. 360.)

We admit the undertaking filed failed in one respect to comply with the statutory requirements. The sureties are not obligated to pay the costs "on a dismissal" of the appeals. Upon the authority of *Jarman v. Rea*, 129 Cal. 157, 61 Pac. 790, and *Hill v. Cassidy*, 24 Mont. 108, 60 Pac. 811, this omission, if a defect, renders the undertaking merely insufficient and not void. (*Gray v. Amador Co.*, 61 Cal. 337; *Spreckels v. Spreckels*, 114 Cal. 60, 45 Pac. 1022; *Spelling on New Trial and Appellate Practice*, sec. 748.)

Where a challenge to the sufficiency of an undertaking on appeal is sustained by the supreme court, it will allow appellant to file a new undertaking without any cross-motion for leave to do so; and hence a motion for leave will not be denied because it was filed after a motion to dismiss for in-

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sufficient undertaking. (*De Stafford v. Bartley*, 15 Colo. 32, 24 Pac. 580; *Hendricks & McBerney v. Mason*, 70 Ga. 523; *McDermid v. Judge*, 122 Ga. 28, 49 S. E. 800; *Elwert v. Norton*, 34 Or. 567, 51 Pac. 1097, 59 Pac. 1118.)

Johnson & Johnson, for Respondent.

Objections not raised in the trial court will not be considered on appeal. (*Smith v. Sterling*, 1 Idaho (Prickett), 128; *Goodman v. Mining Co.*, 1 Idaho, 131; *Heilner v. Brown*, 2 Idaho (Hasb.), 263, 12 Pac. 903; *Murray v. Nixon*, 10 Idaho. 608, 79 Pac. 643; *Watson v. Molden*, 10 Idaho, 570, 79 Pac. 503; *Brady v. O'Brien*, 23 Cal. 244; *Wadleigh v. Phelps*, 147 Cal. 541, 82 Pac. 200; *Beckwith v. Talbot*, 2 Colo. 604; *Moline Plow Co. v. Updyke*, 48 Kan. 410, 29 Pac. 575; *Bishop v. Carter*, 29 Iowa, 165; *Pick v. Glickman*, 54 Ill. App. 646; *Lancaster v. McDonald*, 14 Or. 264, 12 Pac. 374; *Gerheart Realty Co. v. Weiter*, 108 Mo. App. 248, 83 S. W. 278; *Wells v. St. Dizier*, 9 La. Ann. 119.)

The undertaking given in this case was executed by only one surety, and was not conditioned that the appellant would pay all damages and costs which might be awarded against her on the dismissal of the appeal. (*Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 Pac. 147; *Estate of Fay*, 126 Cal. 457, 58 Pac. 936; *Duffy v. Greenbaum*, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323; *Hill v. Cassady*, 24 Mont. 111, 112, 60 Pac. 811.)

The question of sufficiency of the undertaking on appeal has not been properly brought before this court, for the reason that counsel, who was present when the motion was decided below, did not except to the decision of the court on the motion nor to the order denying leave to amend the undertaking, as required by section 4824 of the Revised Statutes. (*Purdum v. Taylor*, 2 Idaho, 167, 9 Pac. 607 and cases cited.)

The statute requires a bond with sufficient sureties; and a single surety does not answer its demands. (*Van Wezel v. Van Wezel*, 3 Paige, 38; *North American Coal Co. v. Dyett*, 4 Paige, 273; *Beebe v. Young*, 13 Mich. 220, 221; *Harris v.*

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Register, 70 Md. 109, 16 Atl. 386; *Appeal of Bartlett*, 82 Me. 210, 19 Atl. 170; *Nichols v. MacLean*, 98 N. Y. 458; *Bennet v. Superior Court*, 113 Cal. 440, 45 Pac. 808.)

The request by appellant, after the hearing of a motion to dismiss an appeal, to be allowed to substitute a sufficient appeal bond for a bond found insufficient, is too late, and will be refused. (*Home & Loan Assn. v. Wilkins*, 71 Cal. 626, 12 Pac. 799; *McCormick v. Belvin*, 96 Cal. 182, 31 Pac. 16; *Bennet v. Superior Court*, 113 Cal. 442, 45 Pac. 808; *Zane v. De Onativia*, 135 Cal. 440, 442, 67 Pac. 685; *Hennessey v. Reed*, 15 Colo. App. 56, 60 Pac. 955.)

The two orders described in appellants' notice of appeal are not appealable, as they are not included in section 4807, Revised Statutes.

The court below sustained plaintiff's motion to dismiss defendant's appeal from the probate court. This is not a final judgment nor a special order made after final judgment. (*Durant v. Comegys*, 3 Idaho, 67, 35 Am. St. Rep. 267, 26 Pac. 755; *Ah Kle v. McLean*, 3 Idaho, 70, 26 Pac. 937; *Theissen v. Riggs*, 5 Idaho, 21, 46 Pac. 829; *Connell v. Warren*, 3 Idaho, 117, 27 Pac. 730.)

The "order rejecting probate of will," the "notice of appeal" from the probate to the district court, and the "minutes of the court," are not part of the judgment-roll. (Rev. Stats. sec. 4456, subd. 2; *Williams v. Boise Basin Min. & Development Co.*, 11 Idaho, 233, 81 Pac. 646.)

SULLIVAN, J.—This appeal is from an order and judgment dismissing an appeal from a judgment rendered by the probate court of Ada county, and from an order denying a motion for leave to amend the undertaking on appeal, from the probate court to the district court. The appellant filed in the probate court of Ada county her petition for the probate of the will of John D. Paige, deceased. A petition in opposition to the probate of said will was filed in said court; thereafter said matter came on to be heard, and after the hearing the probate court made an order that said will be not admit-

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ted to probate; thereafter the petitioner took an appeal therefrom to the district court and filed an undertaking on appeal; thereafter the respondent moved to dismiss such appeal on the ground that no undertaking on appeal had been filed, as required by law, and for the further reason that the order appealed from was not an appealable order. Said motion was sustained by the court and upon the announcement of the decision, counsel for the appellant moved the court for leave to amend her undertaking on appeal. Said motion was denied by the court. Thereafter judgment was entered dismissing the appeal. Two errors are assigned: (1) That the court erred in sustaining the motion to dismiss the appeal; (2) Erred in denying defendant's motion to amend her undertaking on appeal.

In limine, we are met with a motion to dismiss the appeals from the "two orders described in appellant's notice of appeal," on the ground that they are not appealable orders under the provisions of section 4807 of the Revised Statutes of 1887. That section provides from what orders and judgments an appeal may be taken from the district court to the supreme court, and neither of the orders mentioned in said notice of appeal are mentioned in said section. Under the provisions of section 4831 of the Revised Statutes, an appeal may be taken to the district court from a judgment or order of the probate court in probate matters, among other orders that of admitting or refusing to admit a will to probate. But the provisions of that section do not apply to appeals from the district court to the supreme court. Clearly, the district court erred when it held that the order of the probate court refusing to admit said will to probate was not an appealable order. The notice of appeal from the district court to the supreme court states that the appellant appeals from the order of the district court sustaining plaintiff's motion to dismiss plaintiff's appeal from the probate court, and also appeals from the order of said district court denying defendant's motion for leave to amend the undertaking on appeal from the probate court. The appellant also appeals from

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the judgment of dismissal in said matter, thus attempting an appeal from two orders and the judgment. If the record is in proper shape, this court may pass upon the action of the court in dismissing the appeal from the probate court and denying defendant's motion for leave to amend his undertaking on appeal, for all interlocutory orders made prior to judgment may be reviewed on an appeal from the judgment. if such appeal is taken in seasonable time and the ruling of the court on such orders properly presented by the record. Said orders not being appealable orders, we have before us only the appeal from the judgment, and the question arises whether the record properly presents for decision the rulings or orders complained of. This being an appeal from the judgment rendered on an appeal from the probate court under the provisions of section 4819 of the Revised Statutes, the appellant must furnish this court with a copy of the notice of appeal, of the judgment or order appealed from, and of the papers used on the hearing in the court below; and section 2841 of the Revised Statutes provides that the copies of such papers must be certified to be correct by the clerk or the attorneys. The record contains a stipulation by counsel for the respective parties to the effect that the transcript contains full, true and correct copies of the notice of appeal, of the judgment appealed from, of the minutes of the court, and of all papers used on the hearing of plaintiff's motion to dismiss the appeal in the court below. We find contained in the transcript the minutes of the district court, and counsel for defendant moves to strike them out on the ground that they are no part of the papers required by the provisions of section 4819 to the Revised Statutes to be furnished to the court on this appeal, as said minutes were not preserved by bill of exceptions. Said motion is well taken, and the minutes must be stricken out, as said section of the statute does not mention the minutes of the court among those papers required to be furnished on appeal. As bearing on the question, see *Williams v. Boise Basin Mining & Dev. Co.*, 11 Idaho, 233, 81 Pac. 646.

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It appears that the motion made in the district court to dismiss the appeal from the probate court, on the ground that no undertaking on appeal had been filed as required by law, after argument by respective counsel was submitted to the court for its decision, and several days thereafter the court sustained the motion. After the motion had been sustained dismissing the appeal, counsel for appellant asked permission to amend the undertaking, which was denied by the court. There was no error in this action of the court as the case had been dismissed when the application was made, although made as soon as the motion was sustained. If one desires to amend a defective undertaking, application must be made in time and before the court sustains a motion to dismiss.

Counsel for appellant lays much stress upon the point that the motion to dismiss does not specify the particular in which the undertaking is defective, and cites a number of authorities sustaining the proposition that "The notice of motion should specify with particularity the precise grounds upon which the moving party will base his right to the relief sought, and a noncompliance with this rule is sufficient ground for denying the motion." We recognize the force and justice of that rule, but in order to take advantage of it, counsel opposing the motion should object on that ground in seasonable time, and cannot, for the first time, raise the objection in this court, as it would be unjust to the trial court. If counsel proceeds to argue the motion and proceeds as though it specified sufficiently the points made against the undertaking, it would be unjust and unfair to permit him, for the first time, to raise that objection in the appellate court. (*Jackson v. Barrett*, *post*, p. 465, 86 Pac. 270.) The trial court, therefore, did not err in refusing to permit the appellant to amend her undertaking on appeal after the motion to dismiss had been sustained. The court no doubt would have permitted an amendment if application therefor had been made prior to the decision on the motion to dismiss. The judgment is sustained, with costs in favor of the respondent.

Stockslager, C. J., and Ailshie, J., concur.

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ON REHEARING.

(July 18, 1906.)

STOCKSLAGER, C. J.—A petition for a rehearing has been filed in this case, wherein it is contended that this court did not pass upon the sufficiency of the undertaking on appeal. While it is true that we did not point out specifically wherein the undertaking was insufficient, this court held that an application to amend an undertaking on appeal must be made before the motion to dismiss the appeal has been granted, thereby, inferentially at least, holding that said undertaking was insufficient. As a matter of fact it is clearly so.

Under the provisions of an act approved March 11, 1903 (Sess. Laws, p. 372), regulating appeals from probate to district courts, it is provided, among other things, that the undertaking must be in writing, with at least two sureties "to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof not exceeding one hundred dollars." The undertaking under consideration fails to provide that the appellant will pay all damages and costs which may be awarded against him "on a dismissal thereof," and is insufficient in that respect as held by a majority of the court in *Jackson v. Barrett*, *post*, p. 465, 86 Pac. 270. And this court held that after the motion to dismiss had been granted, it was then too late to amend. That being true, we find nothing in the petition that would justify us in granting a rehearing. A rehearing is therefore denied.

Ailshie, J., and Sullivan, J., concur.

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(June 16, 1906.)

**WM. S. ANDERSON, Respondent, v. FERGUSON-BACH
SHEEP COMPANY, Appellant.**

[86 Pac. 41.]

**COSTS AND DISBURSEMENTS—MILEAGE OF WITNESSES—WITNESS' FEES
FOR HUSBAND OR WIFE OF LITIGANT.**

1. The party in whose favor a judgment is recovered is entitled to have costs taxed for mileage of witnesses who reside in an adjoining county and more than thirty miles from the place of trial, and who have attended the trial in response to a subpoena or on request of the party producing the witnesses.

2. Under the provisions of section 6039, Revised Statutes, a witness who resides in an adjoining county and more than thirty miles from the place of trial, is not obliged to attend in response to a subpoena; but the privilege of disobeying the subpoena is personal to the witness, and if he sees fit to waive the privilege and attend and testify, he is entitled to his mileage for actual and necessary travel within the state, the same as any other witness who has attended under compulsory process.

3. The wife of a litigant is entitled to mileage and *per diem* the same as any other witness would be for the same travel and attendance.

(Syllabus by the court.)

APPEAL from the District Court of the Third Judicial District for Ada County. Hon. George H. Stewart, Judge.

From an order taxing costs in favor of plaintiff, defendant appealed. *Affirmed.*

Richards & Haga, for Appellant.

Where a witness resides and is served out of the county and more than thirty miles from the place of trial, his mileage fees cannot be taxed against the losing party. (*Mylius v. St. Louis etc. R. Co.*, 31 Kan. 232, 1 Pac. 619; *Hereford v. O'Connor*, 5 Ariz. 258, 52 Pac. 471; *Sapp v. King*, 66 Tex. 570, 1 S. W. 466; *Marks v. Fields* (Tex. Civ. App.), 29 S.

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W. 664; *Whitehead v. Breckinridge*, 5 Ind. Ter. 133, 82 S. W. 698; *Meagher v. Van Sant*, 18 Nev. 230, 2 Pac. 57.)

These cases are all squarely in point and in favor of appellant's contention upon statutes entirely similar to the Idaho statutes. (See, also, *Hereford v. O'Conner*, 5 Ariz. 258, 52 Pac. 471; *State v. Willis*, 79 Iowa, 326, 44 N. W. 699; *Fisher v. Burlington etc. Ry. Co.*, 104 Iowa, 588, 73 N. W. 1070.)

The rule in the federal courts is clearly stated in 30 American and English Encyclopedia of Law, second edition, 1176.

"The true rule as gleaned from all the authorities is substantially to the effect that the acts of Congress were intended to, and do, allow mileage to witnesses to the full extent of the distance that could be legally reached by subpoena, or, in other words, mileage is allowed to any place within the district or to any point without the district to the extent of one hundred miles from the place where the court is held." (*Eastman v. Sherry*, 37 Fed. 846; *Smith v. Chicago etc. Ry. Co.*, 38 Fed. 321.)

Where a wife is a witness on behalf of her husband, no fees, *per diem* or mileage should be taxed against the losing party.

Fees allowed to either while acting as a witness for the other, when a party to the suit, would, in legal effect, be allowing witness fees to the party. (*Cole v. Angel* (Tex. Civ. App.), 28 S. W. 93; *Hereford v. O'Conner*, 5 Ariz. 258, 52 Pac. 471.)

Perky & Blaine, for Respondent.

Statutes like our section 6039 of the Revised Statutes of 1887 are enacted for the benefit of the witness, which he can waive at will, and if he does so waive such privilege, the party procuring his attendance, if he prevails, can have his *per diem* attendance and mileage taxed as costs against the losing party. The items for the attendance and mileage of witnesses coming from beyond the limit prescribed by law as the distance within which they could be compelled to come were

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properly included in the memorandum of costs claimed by the prevailing party and properly taxed as such. (*McGlaufflin v. Wormser*, 28 Mont. 177, 72 Pac. 428.)

Under our statute a subpoena is unnecessary, and costs could be taxed for the attendance and mileage if he came at the mere request of the prevailing party. (*Crawford v. Abraham*, 2 Or. 166; dissenting opinion of Chief Justice Hawley in *Meagher v. Van Zandt*, *supra*; *Farmer v. Storer*, 11 Pick. (Mass.) 241; *United States v. Sanborn*, 28 Fed. 299; *Christainsen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Wheeler v. Lozee*, 12 How. Pr. 488.)

Under a statute like ours, where a witness living beyond the distance within which he could be compelled to attend court in answer to a subpoena appears in response thereto, and his testimony is taken at the trial, the party producing such witness is entitled, if he be successful, to have the *per diem* fees and mileage of such witness taxed against the losing party. (*Briggs v. Rumeley*, 96 Iowa, 202, 64 N. W. 784; Iowa Code of 1873, sec. 3673; Iowa Ann. Code of 1897, sec. 4660; *Alexander v. Harrison*, 2 Ind. App. 47, 28 N. E. 119; *United States v. Sanborn*, 28 Fed. 299; *Cahn v. Monroe*, 29 Fed. 675; subdivision 11 of par. 19, and authorities cited in note 44, 11 Cyc. 120, 121.)

The prevailing party, who produced his wife as a witness may tax her *per diem* and mileage fees against the losing party. (*Griffith v. Montandon*, 4 Idaho, 80, 35 Pac. 704.)

AILSHIE, J.—This is an appeal from an order taxing costs. The principal question presented for our determination is: Can a successful litigant include in his cost-bill mileage for witnesses who were subpoenaed in a county other than the one in which the trial took place, and who reside more than thirty miles from the place of trial? Section 6039, Revised Statutes, provides that: "A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than thirty miles from his place of residence

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to the place of trial." It is provided by section 6035, Revised Statutes, that: "The process by which the attendance of a witness is required is a subpoena." Section 6 of the act of February 10, 1889 (Sess. Laws 1889, p. 216), provides for the taking of a deposition of a witness who resides out of the county and more than thirty miles from the place of trial. Section 6139, Revised Statutes, is as follows: "Witnesses in civil actions in the district court, or before any referee or commissioners thereof, are entitled to receive three dollars per day for each day's actual attendance, and twenty-five cents per mile one way; to be taxed as costs against the losing party." The statute (Rev. Stats., sec. 4912, as amended) authorizes a party who obtains judgment in his favor to have taxed against the defendant all "items of his costs and necessary disbursements in the action . . . necessarily incurred." It is contended by appellant that since a witness who resides in another county and more than thirty miles from the place of trial is not obliged or compelled to attend, and since his deposition may be taken under the statute, that therefore the successful party cannot recover mileage for such witness. The respondent insists, on the other hand, that the statute exempting a witness from attending who resides out of the county, and more than thirty miles distant from the place of trial, is purely a personal privilege granted the witness, and one of which the litigant cannot take advantage, and of which no one else can complain in case the witness sees fit to waive and forego the privilege granted him.

As will be seen from the foregoing provisions of the statute, a successful litigant is entitled to recover his costs and disbursements from the defeated party. It is also provided that "witnesses" shall receive their *per diem* and mileage. No distinction is made by section 6139, Revised Statutes, among witnesses, nor is it provided that any one class of witnesses shall receive mileage and others not receive it. The statute does not require as a condition precedent to the recovery of mileage by the witness that he should have been *obliged* to attend, or that he should have been *subpoenaed*.

The only test that seems to be required is: Was he a witness? There is no doubt but that a witness who attends a trial, on the request of a litigant, from any part of the state, may recover from the party who procured his attendance a reasonable compensation therefor. If the witness can recover compensation from the litigant who procured his attendance, the sum so paid would undoubtedly be a "necessary cost or disbursement" in the action, and we can see no valid reason why the litigant, if successful, should not recover such a cost and disbursement from the defeated party.

Again, while every person is presumed to know the law, it is a matter of common notoriety that a great number of people who are subpoenaed as witnesses are not in fact aware that they are not compelled to attend if the trial is to take place beyond the county in which they reside. The service of a subpoena duly and regularly issued from a court of competent jurisdiction exerts a strong persuasive influence over the mind of the average witness, and is in ordinary instances calculated to induce the attendance of the witness, even though the litigant may not personally see him and request him to attend. We are aware of the fact that the courts, both state and federal, have held variously under similar statutory provisions, and the authorities are in irreconcilable conflict upon this question. (See 11 Cyc. 120, and notes, 40-44; 30 Am. & Eng. Ency. of Law, 2d ed., 1175, and notes, 2-9; *Raft River etc. Co. v. Langford*, 6 Idaho, 33, 51 Pac. 1027; *McLaughlin v. Wormser*, 28 Mont. 177, 72 Pac. 428; *Perry v. Howe Co-operative Creamery Co.*, 125 Iowa, 415, 101 N. W. 151; 2 Words and Phrases, 1633.) We are strongly persuaded that the purpose and intent of the statute, as well as the reason and justice of the case, demand a construction that will allow the recovery of mileage for witnesses who have attended from any point within the jurisdiction of the state. It is a self-evident proposition to every court and lawyer that the personal presence and testimony of a witness is preferable in every instance, and that depositions, on the other hand, are very unsatisfactory. If a litigant can procure the per-

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sonal attendance of a witness, even though he be beyond the compulsory process of the court, so long as he is within the jurisdiction of the state, we think the courts should encourage him in attending and allow mileage therefor. Of course, fees could not be allowed for the service of a subpoena in cases where the subpoena does not amount to compulsory process, and where the witness may disregard it. It is true that mileage is excessive in this state, and that in many instances it might be very burdensome to litigants, but that is one of the necessary attendants upon litigation, and one of the burdens that must be borne by those who engage in litigation and are found to be in the wrong on the questions over which they are litigating.

It is also contended in this case that the lower court erred in allowing *per diem* and mileage in favor of respondent for the attendance of his wife as a witness on the trial of the case. Counsel cite *Hereford v. O'Connor*, 5 Ariz. 258, 52 Pac. 471, and *Cole v. Angel* (Tex. Civ. App.), 28 S. W. 93, in support of the position that neither a husband nor wife is entitled to fees while attending court as a witness for each other. This question, however, has been squarely passed upon by this court in *Griffith v. Montandon*, 4 Idaho, 80, 35 Pac. 704, where the court said: "The appellant objects to the allowance of *per diem* compensation and mileage to the mother and wife of the plaintiff, but admits that they were in actual attendance three days. Section 6139 of the Revised Statutes of 1887 provides that witnesses in civil actions are entitled to receive three dollars for each day's actual attendance, and twenty-five cents per mile one way. No exception is made because a witness may happen to be a wife or mother of the party calling them." Such fees were accordingly allowed in that case, and we see no reason for changing the rule there announced. It is ordinarily just as expensive and inconvenient for a wife or other relative to attend as a witness as it is for a stranger, and she should be allowed her mileage and *per diem* the same as any other witness. While the wife is, in a sense, interested in an action prosecuted or defended by

Points Decided.

her husband, it is not such a legal interest as will prevent the recovery of witness fees where she is a necessary or material witness in the case. We find no error in the order and judgment appealed from and the same will be affirmed, and it is so ordered. Costs awarded in favor of respondents.

Stockslager, C. J., and Sullivan, J., concur.

(June 19, 1906.)

STATE, Respondent, v. WILLIAM HENRY HICKS BOND,
Appellant.

[86 Pac. 43.]

PRELIMINARY EXAMINATION—MOTION TO SET ASIDE INFORMATION—CORROBORATION OF ACCOMPLICE—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS—ERRONEOUS INSTRUCTIONS—NEWLY DISCOVERED EVIDENCE.

1. Where two parties are separately charged with a felony, upon the preliminary examination of one, the other is called as a witness on behalf of the prosecution, he may refuse to answer any questions either on his examination in chief or on cross-examination that would tend in the least to incriminate him.

2. A motion to set aside the information on the ground that the witness or accomplice refused to answer certain questions on cross-examination at the preliminary examination that in the opinion of the witness tended to incriminate her, will not be sustained.

3. Under the provisions of section 7871, Revised Statutes, an accomplice must be corroborated on some material fact or circumstance which tends to connect the defendant with the commission of the offense, independent of the evidence of the accomplice.

4. Where there are disputed facts submitted to a jury, their verdict will not be disturbed by this court, unless it is apparent from the record that their verdict is unwarranted by the evidence. *Held*, the evidence sufficient in this case to support the verdict.

5. Where the instructions, taken as a whole, amply and fully state the law of the case, the judgment will not be reversed, it being the duty of the jury to consider the entire charge, even though there may have been an instruction partially erroneous, where it is evident that such instructions did not mislead the jury.

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6. Where it is shown that the court erroneously instructed the jury that they "should act upon the evidence of an accomplice with great care and caution, and subject it to careful examination in the light of all the evidence in the case, and the jury ought not to convict upon such testimony alone, unless after a careful examination of such testimony they are satisfied, beyond all reasonable doubt, of its truth," is not sufficient ground for a reversal of the judgment where it is shown the court had twice given the statutory instruction that the accomplice must be corroborated, and it is shown that the accomplice has been corroborated.

7. A new trial will not be granted on the ground of newly discovered evidence, unless it is shown that the introduction of such evidence might change the result of the verdict of the jury in another trial, and sufficient reason must be shown why such evidence could not have been presented at the former trial.

(Syllabus by the court.)

APPEAL from District Court of the Third Judicial District for Ada County. Hon. George H. Stewart, Judge.

Appellant was prosecuted in the lower court on information of the prosecuting attorney charging him with murder, and was found guilty of murder in the first degree. Judgment pronouncing the death penalty was entered, from which and an order overruling a motion for a new trial, the appeal is taken. *Affirmed.*

Silas W. Moody and Perky & Blaine, for Appellant.

Whenever corroboration of the testimony of an accomplice is required it must be as to material facts. (*Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *People v. Plath*, 100 N. Y. 593, 53 Am. St. Rep. 236, 3 N. E. 790; *People v. Courtney*, 28 Hun (N. Y.), 589; *People v. Williams*, 29 Hun (N. Y.), 520; *State v. Spencer*, 15 Utah, 49, 49 Pac. 302; *People v. Thompson*, 50 Cal. 480; *People v. Morton*, 139 Cal. 719, 724, 73 Pac. 609; *Frazer v. People*, 54 Barb. 310; *People v. Koenig*, 99 Cal. 574, 576, 34 Pac. 238.)

The accomplice having gone upon the stand and disclosed matters which she might have refused to answer, she waived her privilege, and defendant had the right to cross-examine

Argument for Appellant.

her thoroughly upon all matters connected with her direct examination. (*State v. Larkin*, 5 Idaho, 200, 47 Pac. 945.) In no event should her counsel have been permitted to make the claim of privilege for her, the rule being that the claim is for the witness alone to assert. (1 Greenleaf on Evidence, 16th ed., 613; Underhill on Criminal Evidence, 304; *State v. Kent* (*State v. Pancoast*), 5 N. Dak. 516, 67 N. W. 1052, 35 L. R. A. 518; *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688.)

After the court instructs the witness that he need not answer, as was done by the magistrate in this case, the witness may then answer if he choose to do so, and if after such caution he answers the question fully, he may then be compelled to divulge every detail of the incriminating transaction. (Underhill on Criminal Evidence, sec. 247, citing *Williams v. State*, 98 Ala. 52, 13 South. 333; *Commonwealth v. Pratt*, 126 Mass. 462; *State v. Van Winkle*, 80 Iowa, 15, 45 N. W. 388; 3 Rice on Criminal Evidence, 517, 518, 521, citing *Commonwealth v. Price*, 10 Gray, 472, 71 Am. Dec. 688; *State v. Foster*, 23 N. H. 348, 55 Am. Dec. 191; *Foster v. Pierce*, 11 Cush. 437, 59 Am. Dec. 152; *Foster v. People*, 18 Mich. 276; *State v. Ober*, 52 N. H. 459, 13 Am. Rep. 88.)

An accomplice is not entitled to the same privilege as an ordinary witness. (*Alderman v. Epole*, 4 Mich. 414, 9 Am. Dec. 321.) Great latitude should be allowed in the cross-examination of an accomplice. (3 Rice on Criminal Evidence, 517.)

The right to cross-examine witnesses is a substantial right of great advantage to the accused, which, if denied, deprives him of a valuable right. (*Matter of Gessner*, 53 How. Pr. (N. Y.) 519.)

A correct instruction cannot be said to modify or supplement a wrong one, as is the case where they are not contradictory. (Hughes' Instructions to Juries, sec. 247, and cases cited; *Lufkins v. Collins*, 2 Idaho, 152, 7 Pac. 95; *Holt v. Spokane R. R. Co.*, 3 Idaho, 703, 35 Pac. 39; *State v. Webb*, 6 Idaho, 428, 55 Pac. 892.)

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The giving of two instructions widely differing from each other on the same vital point in issue in a case is such error that a new trial will be given. An absolute misstatement of the law in giving instructions is not corrected by properly stating the law in other instructions. (Hughes' Instructions to Juries, sec. 248; Sackett's Instructions to Juries, 2d ed., sec. 27, and cases cited; *Mackey v. People*, 2 Colo. 13; *People v. Campbell*, 30 Cal. 312; *Clair v. People*, 9 Colo. 122, 10 Pac. 799.)

And it must affirmatively appear that an error in a charge did not prejudice defendant, or it is cause for reversal.

J. J. Guheen, Attorney General, Edwin Snow, Chas. F. Koelsch, County Attorney, and H. L. Fisher, for Respondent.

The case of an accused in a criminal trial who voluntarily takes the stand is different from that of the ordinary witness. Here his privilege has protected him from being asked even a single question, for the reason that no relevant fact that could be inquired about would not tend to criminate him. (4 Wigmore on Evidence, 3153, par. 2276.) But a witness situated as Mrs. Daly was may be compelled to be sworn and to answer all such questions as will not incriminate him, and whether a question will necessarily elicit such answer is not left solely to the judgment or caprice of the witness; the court must rule on the objection. (*Ex parte Stice*, 70 Cal. 51, 11 Pac. 459; *In re Rogers*, 129 Cal. 468, 62 Pac. 47; *Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372; *People v. Plyler*, 121 Cal. 160, 53 Pac. 553.)

The crime itself was a distinct act, and to have compelled her to give evidence showing her an accessory would have violated her privilege. (*Evens v. O'Conner*, 174 Mass. 287, 75 Am. St. Rep. 316, 54 N. E. 557; *Lombard v. Mayberry*, 24 Neb. 671, 8 Am. St. Rep. 234, 40 N. W. 271; *Emery v. State*, 101 Wis. 627, 78 N. W. 145.)

Mere irregularities or defects in the preliminary examination of a charge will not render it invalid unless they actually prejudice the defendant, or tend to his prejudice in respect

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to some substantial right. (*State v. Clark*, 4 Idaho, 7, 35 Pac. 710; *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481; *State v. Bailey*, 32 Kan. 83, 3 Pac. 769; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207; *People v. Van Horn*, 119 Cal. 323, 51 Pac. 538; *Hamilton v. People*, 29 Mich. 173.)

Counsel have the right in protecting their clients to raise the point of privilege and call the attention of the court to the matter. (*State v. Kent*, 5 N. Dak. 516, 67 N. W. 1052, 35 L. R. A. 518.)

The scope and purpose of a preliminary examination is merely to ascertain that a public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof. (Rev. Stats. 1887, 7579; *State v. Potter*, 6 Idaho, 584, 57 Pac. 431; *In re Levy*, 8 Idaho, 53, 66 Pac. 806; *In re Mitchell*, 1 Cal. App. 396, 82 Pac. 347; *Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154.)

The relations shown to have existed between the defendant and his accomplice supply corroboration of the accomplice's testimony as to motive. (*People v. Cook*, 148 Cal. 334, 83 Pac. 43.)

Illegality in the mode of obtaining evidence cannot exclude it, but must be redressed, or punished, or resisted by appropriate proceedings otherwise taken. (3 Wigmore on Evidence, sec. 2183.)

Defendant's letter was introduced for the sole purpose of showing motive, and it was by the court limited to this purpose. If it is admissible for the purpose claimed, then the other consideration that it may discredit the defendant with the jury cannot bar its admission, but requires only that its purpose be limited by instructions from the court. (1 Wigmore on Evidence, sec. 13; *Conde v. State*, 35 Tex. Cr. 98, 60 Am. St. Rep. 22, 34 S. W. 286; *Thornley v. State*, 36 Tex. Cr. 118, 61 Am. St. Rep. 837, 34 S. W. 264; *People v. Gray*, 66 Cal. 271, 5 Pac. 240.)

For the purpose of proving motive for the murder of the deceased, evidence of the declarations of the defendant tending to show intimate friendship or meretricious relations be-

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tween him and the wife of the deceased is competent; and the fact that the declarations were of a vague and general character goes to their weight and not to their admissibility. (*People v. Brown*, 130 Cal. 591, 62 Pac. 1072.)

Instructions must never be considered separately, but each as limiting and interpreting other portions, and if the law is correctly stated when the instructions are thus considered, the verdict and judgment will not be disturbed. (*Kenyon v. Gilmer*, 5 Mont. 257, 51 Am. Rep. 45, 5 Pac. 847; *People v. Armstrong*, 114 Cal. 570; *People v. Cleveland*, 49 Cal. 577; *People v. Warren*, 130 Cal. 683, 63 Pac. 86; *People v. Dole*, 122 Cal. 468, 68 Am. St. Rep. 50, 55 Pac. 581; *State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.) The testimony necessary to corroborate that of an accomplice need not be strong. (*People v. McLean*, 84 Cal. 480, 24 Pac. 32; *People v. Melvane*, 39 Cal. 616; *People v. Clough*, 73 Cal. 348, 15 Pac. 5.)

The strength or credibility of the corroborating evidence is for the jury. (*People v. Barker*, 114 Cal. 617, 46 Pac. 601.)

STOCKSLAGER, C. J.—This is an appeal from a judgment and order overruling a motion for a new trial. The appellant was prosecuted in the district court of Ada county on a charge of murder on information filed by the prosecuting attorney. The information charges that said “Fred Bond, on the sixth day of October, A. D. 1904, at the county of Ada, state of Idaho, in and upon one Charles Daly, did feloniously, unlawfully, willfully, deliberately, premeditatedly and of his deliberately premeditated malice aforethought, make an assault, with a certain pistol, to wit, a revolver, which said revolver was then and there loaded with powder and leaden bullets, and which said revolver, he, the said Fred Bond, in his hands then and there had and held, feloniously, unlawfully, willfully, premeditatedly, and of his malice aforethought, and with the intent, him, the said Charles Daly, then and there to kill and murder, did then and there shoot off and discharge at, upon and against him, the said Charles Daly,

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thereby and then and there inflicting upon the body of him, the said Charles Daly, a certain mortal wound, of which said mortal wound inflicted as aforesaid, the said Charles Daly then and there died. And so the Fred Bond did in manner and form aforesaid, feloniously, unlawfully, willfully, deliberately, premeditatedly and of his deliberately premeditated malice aforethought, kill and murder the said Charles Daly, contrary to the form, force and effect of the statute," etc.

The defendant was arraigned and the information read to him and time fixed for his plea on January 26, 1905, at 2 o'clock P. M. At this hour his counsel, Perky & Blaine, appeared and filed a motion to set aside the information for the following reasons: "That before the filing of said information this moving defendant had not been legally committed by the magistrate who conducted the preliminary examination in this cause, in that the defendant was denied the right to cross-examine as to material issues of fact, the witness Jennie Daly, who appeared and testified at said examination as a witness in behalf of the state of Idaho. This motion is based upon the files in this cause and upon the record, depositions and testimony taken at the examination of this defendant upon this charge now on file in this court, and upon affidavits filed and served herewith. Then follows the affidavit of Silas W. Moody, attorney for defendant on the preliminary examination of defendant, and the affidavit of defendant, in both of which it is shown that J. J. Blake appeared at said preliminary examination as attorney for Jennie Daly, for the sole purpose of protecting her interests at such examination. Mr. Moody testifies that Jennie Daly was a witness in behalf of the state, and that he made an effort to cross-examine her in behalf of the defendant. "That J. J. Blake, apparently in the interest of the witness, Jennie Daly, was permitted by the examining magistrate to object to certain questions propounded by affiant on cross-examination to said Jennie Daly, on the ground that the answers to said questions might incriminate said Jennie Daly, and tend to furnish evidence to

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convict her of an offense under the laws of the state of Idaho. . . . That she never personally or otherwise than by counsel claimed the privilege of refusing to answer said questions except as above stated. That she never gave any reason for refusing to answer. That the examining magistrate never directed her to answer any of said questions, but always sustained the objections made to the same." The affidavit of appellant is to the same effect. In further support of their motion, counsel for appellant "presented and read to the court the testimony of Jennie Daly from the files of the court taken from the magistrate's return of the deposition and proceedings of the preliminary examination of this case." It may be as well to suggest here that the witness, Jennie Daly, was also charged with the murder of Charles Daly, and was tried and convicted of the crime of manslaughter. It may be necessary later on in this opinion to refer to the testimony above referred to. It is shown by the transcript that the examination of the witness begins at folio 25 and runs to and includes folio 88, much of it consisting of cross-examination. The motion to set aside the information was overruled, and the defendant being again arraigned for plea said he was not guilty. A trial was had and thereafter a verdict of guilty of murder in the first degree was returned and time for sentence was announced by the court to be on the eighteenth day of February, 1905, at which time the statutory death sentence was pronounced.

This appeal is from the judgment and from an order overruling a motion for a new trial. Learned counsel for appellant have assigned a great number of errors, mostly alleged to have occurred during the trial. The first assignment we find is the refusal of the court to set aside the information on motion of appellant on the ground that appellant had not had a preliminary examination as contemplated by our statute. Many pages of the brief of counsel for appellant are directed to a discussion of this question, and numerous authorities cited, it is claimed, in support of their position. We find from the record that there are a number of undisputed

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facts existing in this case. (1) That Charles Daly was found dead in his own home on the sixth day of October, 1904, in Boise, county of Ada, state of Idaho. (2) That certain wounds were found upon his person sufficient to cause his death. (3) That the first information of the death of Daly obtained by the officers was from appellant who informed them that he (Daly) had been killed by his wife. (4) That Daly had been dead several hours before the officers were informed by appellant of his death. (5) That the only inmates of the Daly home were Mr. Daly, Mrs. Daly, their child about two years of age, and appellant. (6) That appellant and Mrs. Daly were frequently together visiting places of amusement, and that Mr. Daly was dissatisfied with such apparent intimacy which led to disputes and ill-feeling between himself and wife, we think is established by the evidence. Under these circumstances, it was but natural that suspicion should rest upon Mrs. Daly and appellant when it was learned by the officers that a crime had been committed and that Mr. Daly had, for some reason, been murdered, hence their arrest and subsequent trials on the charge of murder. On the preliminary examination of appellant, Mrs. Daly was sworn as a witness on behalf of the prosecution and detailed her story of the murder in which Mr. Daly's life was taken. As we gather from the record, at the time she was a witness for the prosecution above referred to, a similar charge was pending against her in one of the courts of the city. She was informed by the court that she could refuse to answer any question that would in any way incriminate her. At this hearing, J. J. Blake, an attorney of this court, appeared on behalf of Mrs. Daly and objected to answers to a number of questions on the ground that such answers might incriminate her. In each instance the witness refused to answer, and the examining court, although requested by counsel for appellant, declined to require an answer or punish for contempt. Upon the record thus made in the examining court, the appellant insists that he did not have a statutory preliminary examination, and that his motion to set aside the

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information should have been sustained. The brief of counsel for respondent furnishes us with a list of the questions which the witness declined to answer while testifying at the preliminary examination: "Q. Did you tell him that you had hid them in the lamp? Q. How did Fred Bond learn where those cartridges were that night? Q. Did you see Fred Bond take any of those cartridges out of the box which you say you concealed in the lamp? Q. Where did Fred Bond get the cartridges that you saw him place in the revolver or gun just after he struck Mr. Daly with this hatchet? Q. Where did you last see the box of cartridges in the house where you resided in on October 5th and 6th, 1904? Q. At what time of day or night did you last see the box of cartridges in your house? Q. What other articles, if any, did you place upon the kitchen table where the revolver was placed? Q. Did you see any other articles placed upon the table where the revolver was placed? Q. Did you place any other article, or articles, upon that kitchen table that morning besides the revolver? Q. Did you know what became of the box of cartridges after you hid them in the lamp in the front room?" It is disclosed by the record that the witness had told just how Mr. Daly came to his death, and in positive language declared that the fatal wounds were inflicted by the appellant. He was thus informed what he must prepare to meet on the trial. In unequivocal language she declares that appellant shot the deceased four times and inflicted four wounds, she thinks, upon his head with a hatchet. Can it be successfully contended that had the witness answered each and all of the above questions in the most favorable light possible to appellant in connection with her positive declarations that the fatal wounds were the results of blows and shots at the hands of appellant, that it would have in the least degree palliated his crime if her statements were to be believed as to the manner and direct cause of the death of Daly?

Counsel for appellant cite many authorities, and with commendable ability urge that the witness Jennie Daly "having gone upon the stand and disclosed matters which she might

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have refused to answer, she waived her privilege, and that defendant had the right to cross-examine her thoroughly upon all matters connected with her direct examination." It must be remembered that the witness was not a voluntary one; she had been called as a witness on behalf of the state and the prosecution had the right to interrogate her on any matters connected with the homicide that did not tend to incriminate herself. In support of this contention that they should have been permitted to cross-examine the witness "thoroughly upon all matters connected with her direct examination," our attention is called to *State v. Larkin*, 5 Idaho, 200, 47 Pac. 945. In this case the defendant was on trial charged with murder. He voluntarily took the witness-stand and gave testimony in his own behalf. In the opinion on rehearing the court say: "This act (referring to acts fifteenth session, page 2), was not cited in appellant's brief, nor in the argument of the case, and we inadvertently overlooked it in considering this case. The amendment to section 6079, cited above, changes the practice as to the manner of cross-examination of a witness, and by express terms limits such cross-examination to the facts stated in his direct examination or connected therewith. Under this rule the defendant in a criminal action who has testified in his own behalf can only be cross-examined by the state as to the facts stated on his direct examination, or connected therewith." The distinction between one who voluntarily offers himself as a witness in his own behalf and one who may be placed upon the witness-stand and required to testify concerning anything that does not tend to incriminate himself, is easily drawn, and the reasons are obvious. In this state one charged with crime may or may not testify, at his option, but if he does testify concerning any matter connected with the transaction, he may be fully cross-examined pertaining to any matters of which he has testified, whilst one—as was the case with the witness Mrs. Daly—may be compelled to testify concerning any crime, so long as the testimony does not tend to incriminate the witness. Counsel for appellant insist that in no event should counsel for witness Jennie Daly have been

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permitted to make the claim for her—that is, to refuse to answer questions on cross-examination—"the rule being that the claim is for the witness alone to assert," and in support of this contention they cite *Greenleaf on Evidence*, 16th ed., 613; *Underhill on Criminal Evidence*, sec. 304; *State v. Pancoast*, 5 N. Dak. 516, 67 N. W. 1052, 35 L. R. A. 518. Next they say: "We understood the law to be that, if after the court instructs the witness that he need not answer, as was done by the magistrate in this case, the witness may then answer if he choose to do so, and if, after such caution, he answers the question fully, he may then be compelled to divulge every detail of the incriminating transaction"; citing *Underhill on Criminal Evidence*, sec. 247; *Williams v. State*, 98 Ala. 52, 13 South. 333; *Commonwealth v. Pratt*, 126 Mass. 462; *State v. Van Winkle*, 80 Iowa, 15, 45 N. W. 388; 3 *Rice on Criminal Evidence*, 517, 518, 521; *Commonwealth v. Price*, 10 Gray, 472, 71 Am. Dec. 668. If all counsel contend for under this assignment of error should be conceded, would it be sufficient to warrant this court in reversing the judgment with the entire record before us for review. We think not. The object of a preliminary examination is to ascertain whether a crime has been committed, and if so, whether there is probable cause for believing that the accused is guilty. When this fact has been ascertained, the requirements of the statute have been satisfied, and it becomes the duty of the examining magistrate to hold the accused with or without bail for his appearance at the next term of the district court. It is in no sense a trial, the only purpose being to ascertain whether the accused should be tried for the alleged crime in the manner prescribed by law. (Rev. Stats., sec. 7579; *State v. Potter*, 6 Idaho, 584, 57 Pac. 431; *In re Levy*, 8 Idaho, 53, 66 Pac. 806; *In re Mitchell*, 1 Cal. App. 396, 82 Pac. 347; *Johnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154.)

It is shown by the record that learned counsel for appellant very skillfully cross-examined the witness, Mrs. Daly, and received answers to all of his questions with the exceptions heretofore enumerated. From this examination appel-

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lant was informed just what he had to meet from this witness on the trial; hence no difference what her answers may have been to the questions, it would not have served the purpose of releasing him. In our view the only result of any answer she may have given in the most hopeful language possible for appellant would have shown her guilty knowledge of and participation in the commission of the homicide. Section 7579, Revised Statutes, prescribes the duties of the examining magistrate in the following language: "If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must indorse on the depositions an order, signed by him, to the following effect: It appearing to me that the offense in the within depositions mentioned . . . has been committed, and that there is sufficient cause to believe that the within named A B guilty thereof, I order that he be held to answer the same."

In *State v. Potter*, 6 Idaho, 584, 57 Pac. 431, this court held that the depositions taken on the preliminary examination of one charged with a criminal offense were not admissible as evidence on the trial, under the statutes of Idaho. To the same effect, see *In re Levy*, 8 Idaho, 53, 66 Pac. 806. In *Re Mitchell*, 1 Cal. App. 396, 82 Pac. 347, the supreme court of California say: "To authorize a committing magistrate to hold one for trial, the evidence produced need not be enough to warrant a conviction. It is enough that there is evidence making it appear that there is sufficient cause to believe defendant guilty of an offense." (See *Johnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154.) We find no error in the ruling of the court overruling the motion.

Counsel for appellant insist that the court should have granted appellant a new trial on their assignment of "insufficiency of the evidence to justify the verdict." It is true, as urged by counsel, that if the appellant is guilty as charged in the information and as returned by the jury, the evidence upon which such verdict is founded is principally that of Jennie Daly, his accomplice in the homicide. Other facts and circumstances were before the jury, which, under the

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instructions of the court, doubtless aided in the final determination and verdict of guilty as charged. It is shown that appellant was an inmate of the Daly home, which was at times distasteful to deceased; that he (Daly) had said to his wife that people were talking about her being seen in company with appellant so frequently; that they were seen together at various places of amusement in the city; that he had written a letter to his sister in which he said he was married, and described his wife as a woman in many respects resembling Mrs. Daly in appearance and nationality; that he did not notify the officers of the death of Mr. Daly until several hours after the occurrence of the homicide. These, and many other facts, are noticeable all through the record, and many of them came from other sources than the testimony of Mrs. Daly. Now, under these circumstances, was there motive on the part of the appellant to take the life of the husband of the woman with whom he frequently associated? Was there a reason to remove the only obstacle in the way of closer relations with this woman? Doubtless all these questions appealed to the jury, and had much to do with their deliberations and final conclusion.

It is said in *Commonwealth v. Ferrigan*, 44 Pa. St. 386: "He is a poor judge of human motives and impulses who could not see in such a relation as is proposed to be proved here between the deceased's wife and the prisoner, that it might lead to the perpetration of the crime charged, or who would deny that it would probably shed light on the motive. History is full of such examples." When it was ascertained that Mr. Daly had been murdered several hours before information was conveyed to the officers, and that the first information came from appellant, it was but natural that suspicion should fall upon appellant and Mrs. Daly, and that their prompt arrest should follow.

It is earnestly urged by counsel for appellant that their objection to the admission of the letter above referred to should have been sustained. Before the letter was read to the jury the court made the following statement: "I will say, gentlemen of the jury, that this letter which is admitted as evidence,

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is admitted on the contention of the state that it has a tendency to prove a motive for the commission of the crime charged, and is offered and received for that purpose and that purpose only." The letter follows:

"Sept. 23rd 04

"Dear Sister and Brothers

"Just a line or two to let you know how i am or where i am living or dead It is a long time since i heard from you which i would be glad to hear from. I am still living got good health and i wish all of you the same I hope susan is still living i hope to meet all of you next spring I am married got a little French girl my family is one girl I dont have to work hard i am in a office Gas Office Living in a city where it is always fine weather never no snow here I hope Nettie is not mad with me i want to be friends with her she knows i respects her and always shall i wonder where she married or not tell me Reuben or where she is sparking i hope she have nice fellow I married the bell of St. Louis she can sing or dance we do take on to all theaters that come here i went to Ringling Bros. with her and everywhere else I shall be satisfied with her til spring and then it will be goodbye to her She would soon bust up a millionare if she had her way Now if you respect me and write me i will send a picture of me and her and baby I would like for Nettie to write me But try one of you to write me i am so ansous to hear from you Give my kind love to Fred and Annie Pedlar Harry you promise me you would write a line or two to me We will have a good time Harry when we meet Reuben and Harry and Nettie try to write a good long letter goodbye remember to the girls from your own loving Brother

"FRED BOND.

"414 North 3rd St Boise City, Ida."

The above letter was state's exhibit 19. Exhibit 20 was an envelope addressed as follows: "Miss Nettie Hicks, No. 12 Walnut St. Old Tamarack Calumet Houghton, Cy., Mich." stamped "Boise. Idaho, Sept. 24, 12 M. 1904." It is urged

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that: "The prosecution failed to disclose in what manner it came into their possession, in whose custody it had been, or to give the information that is usually given preliminary to an offer of this character." It does not occur to us that it is a matter of great importance how the letter found its way into the hands of the prosecution. The important questions are: Did appellant write the letter, and if so, do the contents show a motive on his part for the commission of the homicide?

In 3 Wigmore on Evidence, section 2264, page 3126, the author says: "If there was ever any rule well settled . . . it was this: that an illegality in the mode of obtaining evidence cannot exclude it, but must be redressed or punished or resisted by appropriate proceedings otherwise taken." For a further discussion of this question, see section 2183, same author and volume. It was shown that the letter was signed in the name of Fred Bond, the name by which he was known in Boise City. It was shown that after his signature to the letter he gave his address as 414 North Third Street, the home of the Dalys at that time, and that he was making their house his home. It was shown that the letter was written in red ink and that was the kind of ink used at the Daly home; that the letter was written in the handwriting and the envelope was addressed by Fred Bond. That he was working about the gas office about the time of the date of the letter.

It is insisted that the witness J. D. Agnew, Jr., did not sufficiently qualify as an expert in handwriting to answer as to who wrote the letter and addressed the envelope. He testified that he had seen appellant write on several occasions and was very positive in his declarations that appellant wrote the letter and addressed the envelope.

Mr. Wigmore, in his excellent work on Evidence, volume 1, section 694, says: "Whether one could obtain a sufficient notion of the general character of a person's hand by seeing him write once only might well have been doubted. Tradition, however, has handed down a fixed rule that seeing a person write once only is, as a matter of law, sufficient." Authorities are cited in support of this text.

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In *The Queen v. Silverlock* [1894], L. R. 2 Q. B. 766, 9 Am. Cr. Rep. 276, the fourth clause of the syllabus says: "That a witness giving evidence under this section need not be a professional expert, or a person whose skill in the comparison of handwriting has been gained in the way of his profession or business." When the witness Agnew, Jr., testified in positive language that the handwriting was that of appellant, and that he based his opinion on the fact that he had on several occasions seen his handwriting or saw him write, it was sufficient for the purposes of the prosecution; then counsel for the appellant had the opportunity by cross-examination to show that his knowledge was not based on a sufficient foundation to entitle it to any weight with the jury, in whose hands the entire question of the sufficiency of his knowledge of appellant's handwriting was pending. The learned trial judge not only warned the jury just prior to the reading of the letter that the only purpose of its introduction was to show a motive on the part of appellant to commit the crime as claimed by the prosecution, but in his instruction No. 46 he says: "You are instructed that the letter introduced in evidence as state's exhibit No. 19, and alleged to have been written by defendant, was read in evidence for the sole purpose of showing the alleged motive of the defendant. You are to consider it from that standpoint alone, and give it such weight as you deem it entitled to in connection with all the other evidence in this case. It has no value or place in the evidence for any other purpose."

Before the prosecution could reasonably hope for a conviction of appellant in this case it was necessary to show some motive in taking the life of deceased. As a rule, motive can only be shown by circumstances and conditions. Men who commit crime are not liberal advertisers of their intentions, and quite generally motive as well as malice, and frequently intent, can only be shown by circumstances, a combination of which may furnish an irresistible chain at least sufficient to require an explanation from the accused.

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In *Walker v. State*, 85 Ala. 7, 7 Am. St. Rep. 17, 4 South. 686, it is said: "Motive is an inferential fact, and may be inferred not merely from the attendant and surrounding circumstances, but, in conjunction with these, all previous occurrences having reference to and connected with the commission of the offense." (1 Wigmore on Evidence, sec. 193; *People v. Wood*, 3 Park Cr. Rep. (N. Y.) 681.)

In *People v. Brown*, 130 Cal. 591, 82 Pac. 1072, it is said: "For the purpose of proving motive for the murder of the deceased, evidence of the declarations of the defendant tending to show intimate friendship or meretricious relations between him and the wife of the deceased is competent; and the fact that the declarations were of a vague and general character goes to their weight and not to their admissibility." The above quotation is from the fifth clause of the syllabus. (See Underhill on Criminal Evidence, sec. 62.)

In *People v. Cook*, 148 Cal. 334, 83 Pac. 43, a very recent decision of the supreme court of California, it is held that a letter of a similar character to the one introduced in evidence in the case at bar was admissible. We find no error in the ruling of the court admitting the letter in evidence under the restrictions shown by the statement of the court at the time of its admission, and the instruction relative to the letter thereafter given.

Counsel for appellant attack many of the instructions given by the court on its own motion as well as refusal to give requests of appellant and the modification of other requests of appellant. We find that instruction No. 31 is in the following language: "The jury should act upon the evidence of an accomplice with great care and caution, and subject it to careful examination in the light of all other evidence in the case, and the jury ought not to convict upon such testimony alone, unless after a careful examination of such testimony they are satisfied beyond all reasonable doubt of its truth." This instruction is clearly erroneous and should not have been given, as it does not state the law; neither is it in harmony with instructions 29 and 30. Instruction No. 29 reads: "Under

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the law of this state a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense. And the corroboration is not sufficient if it merely shows the commission or the circumstances thereof." No. 30 reads: "Under the provisions of the statute of this state the corroborating evidence must in itself, without the aid of the testimony of the accomplice, tend in some degree to connect the defendant with the commission of the offense. This corroborating evidence need not be sufficient of itself to establish the guilt of the defendant, but it must tend in some degree to implicate and connect the defendant with the commission of the offense charged. The requirements of the statute are fulfilled if there be any corroborating evidence which of itself tends to connect the defendant with the commission of the offense. The statute does not require that such witness should be corroborated in respect to every material fact, but only in respect to such of the material facts as constitute the necessary elements in the crime charged." The last two quoted instructions correctly state the law of the subject of corroboration. The question to be determined is: Was the jury misled, and could it have been directed to its final conclusion by instruction 31? If so, the judgment should be reversed and a new trial ordered. As has heretofore been said, there were a number of corroborating circumstances amply sufficient to bring this case within the rule of necessary corroboration prescribed by our statute, and it is further apparent that the jury was not misled by the erroneous part of said instruction, as there was ample and abundant corroboration of the accomplice. The court had told the jury in instruction No. 21: "Subdivision 3 of this instruction must be read and considered by the jury in connection with instruction No. 22, as well as all the instructions in this case." Again, in 47 the court says: "All the instructions given you by the court should be taken and read together and considered as a whole as the law governing this case."

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In *People v. Cleveland*, 49 Cal. 577, the court say: "While some of the instructions are perhaps subject to criticism and may not state the law with precise accuracy, yet, taken as a whole, they were substantially correct and could not have misled the jury to the prejudice of the defendant."

Again, in *People v. Armstrong*, 114 Cal. 570, 46 Pac. 611, the court say: "The court instructed the jury in the language of section 111 of the Penal Code, that a conviction could not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself tends to connect the defendant with the commission of the offense," etc. (This section is the same as ours.) Among other instructions, it also gave the following: "If you are satisfied beyond a reasonable doubt, that the defendant is guilty of the crime charged in the information, it will be your duty to return a verdict to that effect." Appellant argues that the jury might have inferred from this instruction that they could be satisfied of defendant's guilt by the testimony of Barlow alone. But the court had informed them that evidence corroborative of that of the accomplice was indispensable to conviction, and it must be assumed that this caution was held in mind when the jury came to consider whether defendant was guilty beyond a reasonable doubt. The charge was to be taken as a whole, and it was not necessary that each paragraph should contain all the conditions and limitations expressed in the others; citing *People v. Morine*, 61 Cal. 367, and cases cited; *People v. Leonard*, 106 Cal. 302-304, 39 Pac. 617.

Again, in *People v. Warren*, 130 Cal. 683, 63 Pac. 86, in passing upon an erroneous instruction, the court say: "This instruction was erroneous as held by this court in *People v. Dole*, 122 Cal. 492, 68 Am. St. Rep. 50, 55 Pac. 581. In that case, however, it was held that where other instructions were given by which it clearly appeared 'that merely aiding or assisting in the commission of a crime without guilty knowledge is not criminal.' The instructions were to be read together and the error cured."

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In *State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034, at the bottom of page 245, it is said: "The instructions, taken as a whole, informed the jury that they must find from the evidence beyond a reasonable doubt that the defendant acted knowingly and with guilty purpose and intent, and excluded the idea that they could convict because he innocently aided in the perpetration of a crime. While the instructions complained of are in part erroneous, yet no substantial right of the defendant was prejudiced. The instructions, taken as a whole, fairly gave the jury the whole law of the case."

In *Kennon v. Gilmer*, 5 Mont. 257, 5 Am. Rep. 45, 5 Pac. 847, it is said: "They (referring to instructions) must never be considered separately, but each as limiting and interpreting other portions, and if the law is correctly stated, when the instructions are thus considered, the verdict and judgment will not be disturbed." In our opinion the rule established, first in California, and followed by Idaho and Montana with practically the same statutes as enunciated by the quotations from the decisions above referred to, has its foundation in reason, equity and justice.

A number of other errors are assigned with reference to the giving and refusing to give instructions, and the admission of evidence over the objection of counsel for appellant. We will content ourselves by the suggestion that a very thorough and careful inspection of the record in this case fully convinces us that the learned trial judge was careful in guarding every right and interest of appellant throughout the entire trial. It is clear that appellant was given the benefit of every doubt by the court in his instructions (with the one exception, which we do not think prejudiced appellant), and that he repeatedly warned the jury that in their deliberations they must be governed solely by the evidence and not return a verdict of guilty unless they were satisfied, beyond a reasonable doubt, of his guilt from the evidence and the instructions given them.

There is a showing made on behalf of appellant of newly discovered evidence. We have carefully examined this ap-

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plication, and if a new trial should be awarded appellant, and he could establish everything claimed in the showing, we cannot see how it would materially aid appellant. As a matter of fact, sufficient diligence is not shown to warrant the court in granting a new trial on this ground, even if it were shown that the introduction of this evidence in another trial might change the result of the last trial. The newly discovered evidence, upon which the new trial is asked, is with reference to a bullet (22-caliber) being found in the east wall of the room in which Daly was killed. The state claim the direction from which the gun was fired was from the southwest. We apprehend the jury in the trial under consideration, and in another one if granted, did and would pay more attention to the bullets that entered the body of the deceased Daly than any that may have entered the walls of the room. It is an undisputed fact that four gunshot wounds were found upon his person and as many wounds upon his head, inflicted by some dull instrument, and that such injuries caused his death. The mere fact that a bullet may have been found in the wall, apparently fired from a different direction than that claimed by the state, would not change the physical facts, nor would it likely result in a change of the verdict in this case. The judgment is affirmed.

Ailshie, J., and Sullivan, J., concur.

(June 20, 1906.)

CARL E. SANDSTROM, Appellant, v. FRANK SMITH
et al., Respondents.

[86 Pac. 416.]

FORECLOSURE OF CONTRACTOR'S LIEN—SUIT IN EQUITY—ACTION AT LAW
—CROSS-ACTION FOR DAMAGES—SPECIAL FINDINGS BY JURY—GEN-
ERAL VERDICT—FINDINGS ON ALL MATERIAL ISSUES.

1. An action was brought to recover a balance due on a contract for the construction of a dwelling-house. The defendants answered, putting in issue the material allegations of the complaint, and filed a cross-complaint wherein they demanded damages for the failure of the plaintiff to complete his contract. Certain questions in the foreclosure suit were submitted to the jury, which they answered, and also brought in a general verdict for the plaintiff. The court thereupon set aside the general verdict and entered judgment without making any further findings than those made by the jury. *Held*, that the jury did not find upon all of the material issues made by the pleadings, and for that reason the judgment must be reversed, as all of the material issues made by the suit to foreclose and the cross-action for damages were not found upon.

2. This being a suit in equity and a cross-action at law, either party had the right to have the questions in the law action determined by the jury, and the court of its own volition might submit certain questions involved in the suit in equity to the jury.

3. In such a case the court may adopt the findings of the jury as its findings; but if the jury fails to find upon any of the material issues made by the pleadings, the court should find upon those issues before entering judgment.

(Syllabus by the court.)

APPEAL from the District Court of the Sixth Judicial District for Bingham County. Hon. James M. Stevens, Judge.

Action to foreclose a contractor's lien and cross-action by defendants to recover damages. Judgment for defendants. *Reversed*.

Argument for Appellant.

Chas. A. Merriman, for Appellant.

The special verdict of the jury must pass upon all the material issues so as to enable the court to pass upon the pleadings and verdict, which party is entitled to recover in this case, (*Hodges v. Easton*, 106 U. S. 413, 27 L. ed. 169, 1 Sup. Ct. Rep. 307; *Ward v. Cochran*, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. Rep. 230; *Montgomery v. Sayer* (Cal.), 25 Pac. 552; Clementson on Special Verdicts, 204-216, 264, and notes.) If this case had been tried by the court or a jury and a "special verdict" rendered, then it would be necessary that the findings must respond to and dispose of all of the material issues in this case. (Rev. Stats. 1887, 4396; *Gould v. Stafford*, 77 Cal. 66, 18 Pac. 879; *Carson v. Thews*, 2 Idaho, 176, 9 Pac. 605; *Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708.)

To justify the court in rendering a verdict on the findings notwithstanding the general verdict, the former must be such as to absolutely determine the controversy in favor of the moving party; the antagonism must be absolute and incapable of being removed by any conceivable evidence legitimately admissible under the issues, to warrant the court in setting aside the general verdict and rendering judgment on the special findings; the true test being whether they would warrant a different judgment from the one entered under all the circumstances in the case. (*Indiana Ry. Co. v. Maurer*, 160 Ind. 25, 66 N. E. 157; *Stoy v. Louisville E. & St. Con. R. Co.*, 160 Ind. 144, 66 N. E. 615; *Wright v. Chicago I. & L. Ry. Co.*, 160 Ind. 583, 66 N. E. 455; *City of South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200, 60 N. E. 271, 54 L. R. A. 396; *Chicago I. L. & Ry. Co. v. Leachman*, 161 Ind. 512, 69 N. E. 253; *Smith v. Michigan Cent. Ry. Co.*, 35 Ind. App. 188, 73 N. E. 928; *City of Mishawaka v. Kirby*, 32 Ind. App. 233, 69 N. E. 481; *Drake v. Justice Gold Min. Co.*, 32 Colo. 259, 75 Pac. 913; *Chicago & N. W. Ry. Co. v. Dunlevy*, 129 Ill. 132, 22 N. E. 15; *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295; *Anderson v. Pierce*, 62 Kan. 756, 64 Pac. 633; Clementson on Special Verdicts, 134-148.)

Holden, Holden, Holden & Holden, for Respondents.

The controlling, decisive issue was as to whether the building had been, at the time this suit was instituted, constructed in a good, workmanlike and substantial manner. Every other question was immaterial and embraced within said issue. A question fully embracing and fairly submitting such issue to the jury is sufficient.

As a matter of law no legal right to recover could accrue to appellant until he had constructed the building in a good, workmanlike and substantial manner. The special verdict is inconsistent with the general verdict, and where a special verdict or finding is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly. (Rev. Stats. 1887, sec. 4397; *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295.)

SULLIVAN, J.—This suit was brought to foreclose a contractor's lien for the balance due for the erection and construction of a dwelling-house. The defendant, by way of answer, denied many of the allegations of the complaint, and by way of cross-complaint set up an action for damages on account of the faulty construction of the dwelling-house referred to, and asked for a judgment for \$1,300 against the plaintiff. The material allegations of the cross-complaint were answered by the plaintiff and denied. The cause went to trial before the court and a jury. Three special questions were submitted to the jury by the court which they answered, and they also rendered a general verdict and assessed plaintiff's damage at the sum of \$200. The court, on motion, set aside the general verdict and drew certain conclusions of law from the special questions submitted to the jury and their answers thereto, without finding any additional facts. The following are the special questions submitted to the jury: "Did plaintiff build, construct and erect or cause to be built, constructed and erected in a good, substantial and workmanlike manner, conformable to the plans and specifica-

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tions, as well as the requested changes made therein, the dwelling-house in question on or before September 25, 1903? A. No. Q. Was the said building constructed in a good, substantial and workmanlike manner? A. No. Q. Have said defendants or either of them ever accepted or approved said building? A. No." From these facts found by the jury, the court drew as conclusions of law—(1) That the plaintiff was not entitled to the decree foreclosing his lien; (2) That the defendants were entitled to judgment and a decree discharging, dissolving and vacating said contractor's lien; (3) That the defendants were entitled to judgment for costs, and judgment was duly entered in conformity with said conclusions of law. This appeal is from that judgment.

It will be observed that this action was brought to foreclose a contractor's lien. The action, then, was a suit in equity. By answer, the defendants put in issue the material allegations of the complaint, and as a cross-action they set up by way of cross-complaint an action for damages, accruing by reason of the failure of the plaintiff to construct the building referred to, in accordance with the contract. Thus we have here an equity suit to foreclose a mechanic's lien, and a cross-action at law for damages. The respondents did not dismiss their cross-action for damages, and could not do so, after plaintiff had answered the cross-complaint, without his consent.

It appears from the foregoing questions and answers that those questions arose out of the suit in equity to foreclose the contractor's lien, and not out of the cross-action for damages. The parties had a right to have the cross-action tried by a jury, and it was discretionary with the court whether or not it would submit special questions in the suit in equity to a jury. The jury's answers in the equity suit were simply advisory to the court. It is clear to us, from the record, that the jury considered the evidence in the equity branch of the case in answering the special interrogatories and in the trial of the question of damages, took into consideration the evidence on that question, and came to the conclusion that the

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defendants had not sustained \$1,300 in damages, but had sustained the difference between the amount claimed by the plaintiff, which was \$926.20 and \$200, for which latter sum they gave plaintiff a verdict. But whether that be the correct conclusion or not, after hearing the whole case, they found a general verdict for the plaintiff for \$200. The court then set aside the general verdict and without making any findings of fact whatever, adopted the findings of the jury on the special questions submitted to them, as facts found by the court, and entered judgment against the plaintiff, canceling his mechanic's lien.

A court may adopt the findings of a jury in an equity case as the findings of the court and base its judgment thereon, but that does not obviate the necessity of making additional findings covering every material issue made by the pleadings, if the jury has not done so. As will be observed from the interrogatories and answers thereto, the jury found that the house in question was not completed before September 25, 1903; that the building was not constructed in a good, substantial and workmanlike manner, and that the defendants had never accepted or approved said building. Conceding, for the sake of argument, that those findings cover all the material issues made in the equity branch of the case, there is no finding whatever on any of the issues made by the cross-action for damages. That being true, the judgment must be reversed, and the cause remanded, with instructions to set aside the judgment and retry the case.

Costs are awarded to appellant.

Stockslager, C. J., and Ailshie, J., concur.

Points Decided.

(June 20, 1906.)

DANIEL HELPERY et al., Appellants, v. JOSEPH PERRAULT et al., Respondents.

[86 Pac. 417.]

MANDAMUS—SUFFICIENCY OF COMPLAINT—JOINDER OF PLAINTIFFS—COMMON INTEREST OF PLAINTIFFS.

1. Where several land owners contract and agree among themselves to unite in interest and construct their own ditch or lateral, and make a joint application to a ditch company for sufficient water for all their land as one applicant, they may join as plaintiffs in an action to compel the water company to deliver the quantity of water applied for at their headgate.

2. Where several parties agree among themselves to unite in interest and jointly apply as one applicant for water for irrigation purposes and to use and apply the water in rotation, the fact of joinder and rotation in the use of the water are not valid and sufficient grounds on which the water company may refuse to furnish water to them at their common headgate.

3. The times and order of use and application of water by several land owners under the same lateral to their respective tracts of land are matters of no concern to the water company where the several users by agreement among themselves distribute and use the water at the times and in the manner agreeable to them, and the company has no duty but that of seeing that the requisite quantity of water flows through the headgate into the consumer's ditch.

4. Complaint in this case held sufficient to sustain a cause of action and not demurrable for the misjoinder of parties plaintiff.

(Syllabus by the court.)

APPEAL from the District Court of the Third Judicial District for Ada County. Hon. Frank J. Smith, Judge of the Seventh Judicial District, presiding.

Action to procure a writ of mandate; demurrer to complaint was sustained and a judgment was entered dismissing the action. Plaintiffs appealed. *Reversed.*

Neal & Kinyon, for Appellants.

All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, except when otherwise provided in this code. (Rev Stats., sec. 4101; *Frost v. Alturas Water Co.*, 11 Idaho, 294, 81 Pac. 996; Pomeroy's Code, Remedies, 4th ed., secs. 116, 117; *First Nat. Bank v. Hummel*, 14 Colo. 259, 23 Pac. 986; 15 Ency. of Pl. & Pr. 668; Phillips' Code Pleading, sec. 457.)

An agreement can be entered into between water users as to the time and manner of use, and will be respected by the courts and enforced so far as the rights of third parties are concerned. (*Lytle Creek Water Co. v. Purdew*, 65 Cal. 447, 4 Pac. 426, 431 et seq.; Long on Irrigation, secs. 61, 111; Wiel on Water Rights, sec. 49.)

Hawley, Puckett & Hawley and Fremont Wood, for Respondents, cite no authorities on the points decided.

AILSHIE, J.—This action was commenced for the purpose of procuring a writ of mandate compelling the defendants, doing business under the name of the Perrault Ditch Company, to turn out of their main canal and deliver to the plaintiffs “.14 of a second foot of water per second continuous flow,” for the purpose of irrigating certain lands belonging to the plaintiffs. The action is commenced by Daniel Helphery and twelve others. Helphery makes the affidavit in which he says “that he, together with the other above-named plaintiffs, own, possess and occupy the following described real estate, all situated in Lemp's addition to Boise City, Ada county, Idaho, namely, etc.” He further deposes “that he is duly authorized to represent the interests of all the other plaintiffs herein, and is authorized to receive all notices, orders and directions necessary and proper to be made in and about, procuring, using and distribution of the said water mentioned among these several plaintiffs . . . ; that it is the desire of each and every of the said

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plaintiffs herein that said water shall be used as among themselves as a single stream of water, they applying it to their said tracts of land at such times and in such manner as to them may seem proper." It is also alleged that the plaintiffs have already constructed the necessary ditch or lateral at their own expense for the purpose of carrying and conveying the water applied for from the company's main canal to and upon their respective lands. They allege the necessary and proper tender of a year's rental for the amount and quantity of water for which they applied. The defendants demurred to the complaint, or affidavit, on the ground that it does not state facts sufficient to constitute a cause of action or entitle them to a writ, and also on grounds of misjoinder of parties plaintiff. The demurrer was sustained by the trial court and judgment was entered dismissing the action and the plaintiffs have appealed. The only question that arises in this case for our determination is: Can the several plaintiffs by contract and agreement among themselves unite and join in interest and make a legal application and demand for water for all their lands jointly and have the same treated and considered as one application, and when water is turned out to them, apply it at such times and in such manner to their several tracts of land as they may decide upon among themselves? In the first place, we think there is no doubt but that the plaintiffs have the right to enter into such contract and agreement among themselves for the application and use of the water at such times and in such manner as they may deem to be their best interests. If they choose to apply and use the water as among themselves in rotation, we have no doubt of their right to do so. This right being recognized, it necessarily follows that so soon as they have entered into such a contract or agreement a common right and interest at once arises among them which entitles them to join as coplaintiffs in an action for the preservation and protection of such right. (Rev. Stats., sec. 4101; *Frost v. Alturas Water Co.*, 11 Idaho, 294, 81 Pac. 996.)

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It is argued by counsel for respondents that neither the constitution nor statutes of this state recognize the right of water users to enforce upon ditch companies the delivery of water by rotation. They contend that the only water right recognized is one of a continuous flow. Without deciding that question, the proposition may be fully conceded for the purpose of this case, for the reason that the plaintiffs do not ask that the water company deliver the water to them in rotation, but, on the other hand, they ask for a continuous flow of .14 of a second foot turned into their ditch at the headgate. If this should be done, the only duty of the company would be to see that the required volume of water is kept flowing in at the plaintiff's headgate continuously. The rotation and distribution of the water among the several plaintiffs will be a matter of no concern to the ditch company, and one exclusively for the determination and disposition of the several plaintiffs. The ditch company will only have to deal with one person, namely, the agent or representative of the several plaintiffs. Rotation in irrigation undoubtedly tends to conserve the waters of the state and to increase and enlarge their duty and service, and is, consequently, a practice that deserves encouragement in so far as it may be done within legal bounds.

Respondents have argued that plaintiffs' action should fail, for the reason that the application for the use of the water was not made prior to the first day of January, as prescribed by section 20 of the irrigation act of February 25, 1899 (Sess. Laws 1899, p. 383). We do not think that objection is well taken in a case where all prior applicants for water have been supplied and the ditch company still has water for rental and distribution. The provisions of section 20 of the act referred to were intended for a regulation between different applicants and also for a protection to the company, as well as the consumer, where one applicant had previously used the water on his land and another applicant had never before applied water to his land.

Points Decided.

The complaint states a cause of action and the demurrer should have been overruled. The judgment is reversed and the cause remanded, with directions to the trial court to overrule the demurrer and allow the defendants ten days in which to answer the complaint. Costs awarded to appellants.

Sullivan, J., concurs.

STOCKSLAGER, C. J., Concurring.—In view of the peculiar facts as stated in the complaint in this case, I concur in the conclusion reached by my associates. I am satisfied the management and control of canals and laterals as a rule must be left to the company, association or corporation owning and operating the property; otherwise endless litigation would follow. It is the duty of anyone operating a canal to so distribute the water that the legal rights of all consumers should be protected; hence, the necessity of absolute control over the canal and laterals, where conflicting rights may arise.

(June 20, 1906.)

In the Matter of the Appeal of GEORGE P. RHEA, Prosecuting Attorney of Washington County, Appellant, v. THE BOARD OF COUNTY COMMISSIONERS, Respondent.

[88 Pac. 89.]

FEES OF CLERK OF THE DISTRICT COURT, EX-OFFICIO AUDITOR AND RECORDER, AND OF THE PROBATE JUDGE—FEES FOR TAKING FINAL PROOF OF CLAIMANTS FOR GOVERNMENT LANDS—FEES FOR PERFORMING MARRIAGE CEREMONIES.

1. The clerk of the district court, *ex-officio* auditor and recorder, under the provisions of section 7, article 18 of the constitution, and the law carrying that section into effect, must pay quarterly, to the county treasurer, all fees which may come into his hands, from whatever source, over and above his actual and necessary ex-

Argument for Appellant.

penses. This includes all fees for services rendered by virtue of said offices.

2. Under said provisions of the constitution and law, the probate judge must account for and turn into the county treasury all fees received by him for services rendered by virtue of his office, over and above his actual and necessary expenses.

3. The salary paid to such officers, under the law, is in full compensation for all services rendered by them.

(Syllabus by the court.)

APPEAL from the District Court of the Seventh Judicial District for Washington County. Hon. Frank J. Smith, Judge.

Judgment of the district court rendered on appeal from an order of the board of county commissioners. *Reversed.*

George P. Rhea, Prosecuting Attorney, *pro se.*

A county officer must account for and pay all fees over to the county and report to the board each quarter. (Const., art. 18, sec. 7; Sess. Laws 1899, p. 405; *Clyne v. Bingham County*, 7 Idaho, 75, 60 Pac. 76.)

Where the salary or compensation of a county official is definitely fixed by law, it is generally held that such sum is intended to include his entire official remuneration, and to preclude extra charges for any services whatever. (11 Cyc. of L. & P. 429 (b), citing *Humboldt Co. v. Stern*, 136 Cal. 63, 68 Pac. 324, and many other cases; *Board of County Comms. of Graham Co. v. Van Slyck*, 52 Kan. 622, 35 Pac. 299; *Raymond v. Commissioners of Madison Co.*, 5 Mont. 103, 2 Pac. 306; *County of Kern v. Fay*, 131 Cal. 549, 63 Pac. 857; *Dodge v. City and County of San Francisco*, 135 Cal. 512, 67 Pac. 973.) Ordinarily, when an official is allowed a definite salary, he cannot claim compensation for services rendered *ex officio* in any other capacity (11 Cyc. 434, citing *Dysart v. Graham Co.*, 5 Ariz. 123, 48 Pac. 213; *Henderson v. Pueblo Co.*, 4 Colo. App. 301, 35 Pac. 880; *Barch v. Cutter*, 6 Utah, 409, 24 Pac. 526.)

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By accepting the office to which he has been elected, a county officer agrees to accept the salary fixed to that office as full compensation for all services which he may render the county during his term of office, whether they be those enumerated in the statute or not, and he is inhibited from receiving any further compensation for any services which he may render the county. (*County of Humboldt v. Stern*, 136 Cal. 63, 68 Pac. 234; *Raymond v. Commissioners of Madison Co.*, 5 Mont. 103, 2 Pac. 308.)

Frank Harris, for Respondent.

A public officer is not bound to perform all manner of public service without compensation because his office has a salary annexed to it. Nor is he, in consequence of holding an office, rendered legally incompetent to the discharge of duties which are clearly extraofficial, outside of the scope of his official duties. (*Mechem on Public Officers*, sec. 863; *Evans v. Trenton*, 24 N. J. L. 764.)

SULLIVAN, J.—This is an appeal from the judgment of the district court of Washington county, confirming an order on appeal from the board of county commissioners.

It appears from the record that the clerk of the district court of that county, who was *ex-officio* auditor and recorder, made and filed with the board of county commissioners his quarterly report of fees received for the quarter ending June 30, 1905; and the probate judge of said county also filed his quarterly report of fees received for the same quarter; that the report of said clerk did not include the fees received by him for a large number of proofs made upon government lands, for each of which he received the sum of \$4, and only accounted for and paid over to the county treasurer seventy-five and ninety cents of the \$4 fee received by him, and retained and appropriated to his own use the remainder. It is contended by counsel for the appellant that, as said fees were received by reason of the officer holding the office of clerk, he must account for all of said fees. It is also shown by

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the record that the probate judge had performed a number of marriage ceremonies, and had received therefor the amount of \$5 for each ceremony performed, and had failed to include such fees in his said quarterly report, and the same contention is made in his case.

The only question for consideration is, whether, under the law, the fees so received by the clerk and probate judge must be accounted for and turned in to the county treasurer. It appears from the record that the clerk's salary had been fixed at \$1,700 per annum, and the probate judge's salary at \$900 per annum. It is contended by appellant that those officers have the right to perform these duties only by virtue of their respective offices, and that as each receives a stated salary annually, under the law, such salary is in full compensation for all services rendered by them; that all fees coming into their hands, by virtue of their respective offices, from whatever source, must be turned over to the county. By the rules and regulations of the general land office of the United States, the clerk of any court of record of the land district in which the land is situated is authorized to take final affidavit and proof from applicants for government lands, and receive certain compensation or fees therefor. It is claimed that such officer is authorized to perform the services rendered in said matter, and charge the fee allowed by virtue of his office and not otherwise. The same may be said of the probate judge. He can only perform marriage ceremonies by virtue of his office, and the law authorizes him to charge a fee of \$5, but he may receive any other or larger sum voluntarily given by the parties to the marriage. (Rev. Stats., sec. 2438.) So it will be observed that the probate judge was authorized to charge and collect that fee by virtue of his office. The law fixes the fees that those officers may charge, and also requires the officer to perform such services on payment of the fees prescribed, and any failure or refusal to perform official duty when the fees are tendered, makes the officer liable on his official bond. (Rev. Stats., sec. 2137.)

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Section 7, article 18 of the state constitution provides, among other things, "that all county officers shall receive fixed annual salaries, to be paid quarterly out of the county treasury, and that all fees which may come into his hands, from whatever source, over and above his actual necessary expenses, shall be turned into the county treasury at the end of each quarter." And it further provides: "That at the end of each quarter, he shall file with the clerk of the board of county commissioners a sworn statement, accompanied by proper vouchers, showing all expenses incurred and all fees received, which must be audited by the board, as are other accounts."

The language of said section of the constitution is too plain and obvious to require construction, and clearly requires the officer, after retaining his actual and necessary expenses, to turn into the county treasury all the fees that come into his hands, from whatsoever source. This certainly means all fees that come into his hands for services rendered, by virtue of his office. If the clerk of that court and probate judge of Washington county had not held those offices, they could not, and would not, have received the fees referred to. The framers of the constitution, as well as the legislature, certainly meant to require those officers to turn into the county treasury all fees that came into their hands, by virtue of their offices, over and above their actual and necessary expenses. That being true, the judgment of the trial court must be reversed, and it is so ordered, with costs in favor of the appellant.

Stockslager, C. J., and Ailshie, J., concur.

ON PETITION FOR REHEARING.

(July 7, 1906.)

STOCKSLAGER, C. J.—In this case the respondent insists that this court did not pass upon all the points raised by their motion, and owing to the fact that the case was sub-

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mitted on briefs, the court is inclined to hear anything further respondent may have to say in support of their contention; hence a rehearing is granted.

Ailshie, J., and Sullivan, J., concur.

ON REHEARING.

(January 5, 1907.)

1. Under the provisions of section 2294 of the Revised Statutes of the United States as amended by act of March 11, 1902 (32 U. S. Stats. at Large, 64), the clerk of the district court who takes homestead or other land proofs must do so in his official capacity and all fees collected by him for such service, whether for "preparing the deposition" or administering the oath and affixing the jurat, are provided for by the statute, and are collected by him in his official capacity and by virtue of his office, and must be accounted for and paid over to the county.

2. Any gratuity received by a probate judge over and above the statutory fee of five dollars for solemnizing a marriage may, under section 2438, Revised Statutes, be retained by him for his individual use and benefit.

(Syllabus by the court.)

AILSHIE, J.—A rehearing was granted in this case on July 7, and the case was again argued at this present term of court. Counsel for respondent urge in the first place that no final judgment has ever been entered from which an appeal could be prosecuted, and that this court is without jurisdiction to determine the case on its merits. This contention is not well founded for the following reasons: In the first place, section 1776 of the Revised Statutes as amended by act of February 14, 1899 (Sess. Laws 1899, 248), provides that "an appeal may be taken from any act, order or proceeding of the board by any person aggrieved thereby," etc. The order of the board of commissioners from which the appeal was taken to the district court was an order entered overruling the county attorney's application and request that the board require the clerk of the district court and probate judge each to include in their quarterly reports all fees received by

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them including fees for taking final land proof and solemnizing marriage. The board recited their reasons at some length for refusing to follow the advice of the county attorney and denying his application and request. They also recited the fact that each of these officers had received such fees as the county attorney advised them should be turned into the county. The county attorney appealed from this order of the board and in taking such appeal he was clearly within the provisions of section 1776, *supra*. The district court heard the case on its merits, evidence being introduced at considerable length in relation thereto, and made and filed his findings of fact and entered judgment sustaining and affirming the action of the board of commissioners, and holding that the fees referred to by the county attorney were not such as are required to be turned into the county. This judgment entered by the district court was a final judgment affirming and approving the action of the board of commissioners. The county attorney has appealed from that order, and his case is properly before this court for determination on its merits.

The principal contention made by counsel for respondent on the rehearing is that under section 2294 of the Revised Statutes of the United States as amended by act of March 11, 1902 (32 U. S. Stats. at Large, 64 [U. S. Comp. Stats. 1905, p. 322]), any person, whether an officer or not, may prepare, depositions of homesteaders and other land claimants and their witnesses, and that the only official act is that of administering the oath, for which the statute allows twenty-five cents. That section so amends the old law as to authorize final proofs to be made before a United States commissioner or a judge or clerk of any court of record within the land district in which the lands claimed are situated. The particular portion of the section which bears upon the question in controversy is as follows: "The fees for entries and for final proof when made before any other officer than the register and receiver, shall be as follows: For each affidavit, twenty-five cents. For each deposition of claimant or witness, when not prepared by the officer, twenty-

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five cents. For each deposition of claimant or witness when prepared by the officer, one dollar. Any officer demanding or receiving a greater sum for such services shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by fine not exceeding one hundred dollars." It will be observed from the foregoing that where the deposition is prepared by the officer who administers the oath and affixes the jurat, he shall be entitled to collect and receive one dollar for each deposition, and where the deposition has been prepared by some one else, he is allowed to collect and receive twenty-five cents for administering the oath and affixing the jurat. Now, it is insisted that since any person can prepare the deposition the officer may do so as a private citizen, and that while he may charge the one dollar fee, he will only be required to account for the twenty-five cents which is earned and received by him for administering the oath and affixing the jurat. The difficulty, and it seems to us the fallacy in the argument, rests in the fact that under the statute the only charge that any officer designated therein can make must be made in his official capacity and under the statute itself. A private citizen or any person not authorized to take these proofs may prepare the deposition for the claimant, and make any charge therefor agreed upon between him and the claimant, and however much that charge may be. it will not be a violation of the statute and will not subject the party to a prosecution thereunder. But no officer designated by the statute can make any greater charge either in his official or individual capacity than that prescribed by statute. If he should do so he would be guilty of a misdemeanor. He cannot separate himself from the office which he occupies for the purpose of performing such duty or collecting such or any fee. It is therefore clear to our minds that the fee prescribed by section 2294, *supra*, whether for making the deposition or administering the oath, or for both, is provided for and collectible by the officer in his official capacity and by virtue of his office, and not as an individual, and that he can no more segregate himself from the office

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which he occupies for the purpose of collecting one part of the fee than he can for the other. It must be admitted that if the individual were not occupying such office, he might prepare such a deposition and receive any sum therefor that he could collect without subjecting himself to any of the penalties of the statute, but this he cannot do while discharging the duties of such office. The most exhaustive and interesting case bearing upon this subject to which our attention has been called is that of *Finley v. Territory*, 12 Okla. 621, 73 Pac. 273. In that case the Oklahoma supreme court had before them the question as to whether or not a probate judge could retain for his own use and benefit fees and compensation received by him in the discharge of his duties under the act of Congress, authorizing probate judges to file upon and procure patents for townsites. The court held that while the authority to perform the acts in question was granted by act of Congress instead of by the legislature, that nevertheless the power and authority was conferred upon the office instead of the individual, and that it did not create any separate office nor did it entitle him to retain the fees collected under such act. In that case many authorities are cited and reviewed touching the question of fees and compensation of public officers, and the duty of such officers to account for all fees to the county or state, as the case may be. In *State ex rel. Frontier Co. v. Kelly*, 30 Neb. 575, 46 N. W. 714, it was held that where a county clerk who was also a notary public took acknowledgments of deeds, mortgages and certified affidavits and depositions as a notary public, it was his duty to enter upon his fee-book as county clerk and report to the county board every item of fees and compensation received by him for such services. It was held that he could not procure the appointment as notary public and discharge duties as notary which devolved upon him as county clerk, and thereby deprive the county of the benefit of such fees and increase his own salary and compensation by the operation. We are satisfied that under the provisions of our statute and constitution as cited in the original opinion; the fees

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claimed by the clerk and the probate judge belong to the county, and should have been reported and turned over to the county. We agree with counsel for respondent that under section 2438 of the Revised Statutes a probate judge may receive any sum "voluntarily given him by the parties" over and above the statutory fee of five dollars for solemnizing marriages. In such case the statute provides specifically that such officer may receive any gratuity, and in that case he is undoubtedly entitled to retain the same, accounting to the county only for the statutory fee. The judgment of the trial court is reversed and cause remanded, with directions to the trial court to take such further action as may be necessary in accordance with the views herein expressed. Costs awarded in favor of the appellant.

Sullivan, J., concurs.

STOCKSLAGER, C. J., Concurring.—I concur, but if it is true that in some of the counties the salary of the probate judge and auditor and recorder has been fixed on a basis that the fees not provided for by statute or labor not enjoined upon such officer by statute should not be accounted for by such officer, or that he was at liberty to retain such fees over and above his salary as fixed by the county commissioners, equity would or should require that the officer be compensated for the labor performed in the amount intended to be paid by the county commissioners. In other words, it is not justice to the officer to fix his salary on a basis that he is to receive and retain certain fees, and thereafter require him to pay such fees into the county treasury, thus reducing the salary contemplated by the county commissioners.

Points Decided.

(June 21, 1906.)

COMMODORE JACKSON, Respondent, v. F. H. BARRETT et al., Appellants.

[86 Pac. 270.]

MOTION TO DISMISS APPEAL—WHERE JURISDICTION OF TRIAL COURT ATTACHES AFTER DECISION ON APPEAL—DISMISSAL OF APPEAL—SECOND APPEAL—UNDERTAKING ON APPEAL—OBLIGATION OF SURETIES.

1. Where a motion to dismiss an appeal is confessed and the court dismisses the appeal without prejudice to another appeal, the second appeal may be perfected at any time after the order of dismissal is made, regardless of whether the *remittitur* has been filed in the trial court or not.

2. Under the provisions of section 4809, Revised Statutes, and the surety company law, the undertaking on appeal must be executed on the part of the appellant to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof, not exceeding \$300.

3. If, in such undertaking, the sureties fail to obligate themselves to the effect that the appellant will pay all damages and costs which may be awarded against him on a dismissal of the appeal, the undertaking is insufficient and may be amended on reasonable application.

4. One who relies on technicalities must be held to observe technical rules.

(Syllabus by the court.)

APPEAL from the District Court of the Fourth Judicial District for Elmore County. Hon. Lyttleton Price, Judge.

Action to recover a money judgment. Judgment for plaintiff. Motion to dismiss appeal. *Sustained.*

E. M. Wolfe, for Appellants.

W. C. Howie, for Respondent.

Counsel cite no authorities on points decided not cited by the court.

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SULLIVAN, J.—This cause was before this court on appeal at its 1906, February term. Counsel for respondent moved to dismiss the appeal, which motion was confessed by counsel for the appellant, and the appeal was, on the thirteenth day of February, 1906, dismissed without prejudice to another appeal. Another appeal has been taken, and counsel for respondent now moves to dismiss the appeal on two grounds: (1) That no sufficient undertaking on appeal has been filed herein; (2) That at the time this appeal was taken, to wit, on the thirteenth day of February, 1906, the district court had no jurisdiction over said case, for the reason that it had been theretofore appealed to the supreme court, and the *remittitur* from said court had not been filed in the district court, and was not filed until the fifteenth day of February, 1906.

We will first dispose of the second contention. It appears from the records of this court that the first appeal in this case was dismissed without prejudice to another appeal on the thirteenth day of February, 1906, and that thereafter, and on that day, the *remittitur* of this court was issued and mailed to the clerk of the district court, from whence the appeal was taken. On said day, after said dismissal, counsel for appellant prepared and served his notice of appeal on counsel for respondent, and on the same day filed an undertaking on appeal. It is contended by counsel for respondent that the jurisdiction of the district court did not attach until the *remittitur* was filed on the fifteenth day of February, and for that reason the appeal was prematurely taken. In other words, he contends that this court had jurisdiction of said case until the *remittitur* was actually filed in the trial court. In support of that contention, he cites *Hazard v. Cole*, 1 Idaho, 276, where it is said at page 305: "The general rule seems to be well settled that this court loses jurisdiction of a case when the *remittitur* has been sent to and filed in the court below." He cites in support thereof *Grogan v. Ruckle*, 1 Cal. 192; *Lesse v. Clark*, 20 Cal. 387; *Rowland v. Kreyenhagen*, 24 Cal. 52. The court then further says: "This gen-

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eral rule rests, however, on the supposition that all the proceedings have been regular, and that no fraud or imposition has been practiced upon the court or opposite party; for if such appears to have been the case, the appellate court will assert its jurisdiction, and recall the case." Counsel also cites *Hosack v. Rogers*, 7 Paige, 108, and *Burckle v. Luce*, 3 How. Pr. 236. In the latter case the court held that it had the jurisdiction of a case until the *remittitur* was filed with the clerk of the court below.

In *Anthony v. Grand*, 99 Cal. 602, 34 Pac. 325, the supreme court of California held that where an appeal was dismissed one day and a second appeal taken on the next day, the latter should not be dismissed on the ground that a prior appeal was then pending. In *Sligh v. Shelton S. W. R. Co.*, 20 Wash. 16, 54 Pac. 763, the supreme court of Washington held that an appeal perfected on a second notice of appeal was not objectionable because there was no formal order of dismissal of the first appeal; and the same court in *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571, held that a person, by giving a premature notice of appeal and filing an appeal bond and abandoning it, is not deprived of the right to appeal on a second notice seasonably given, though there is no formal dismissal of the first appeal.

Where, as in the case at bar, counsel for respondent moves to dismiss the appeal, and such motion is confessed by the opposing counsel and allowed by the court, and an order dismissing the appeal without prejudice is made, a new appeal may be perfected as soon as the order of dismissal is made.

It is evident in this class of cases, when an appeal is dismissed without prejudice, that another appeal may be taken, if the time for taking an appeal has not already expired. It might occur that the time for another appeal would expire on the next day after the appeal was dismissed, and if the party was not permitted to make such appeal until after the *remittitur* was filed, he would lose his right of appeal. While, as a general rule, a trial court should not take jurisdiction and do anything in a case that has been appealed until the

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remittitur is filed in that court, in a case where a dismissal of the appeal is made without prejudice to another appeal, such an appeal may be taken immediately after the dismissal is granted. This class of cases is an exception to the general rule stated in *Hazard v. Cole*, 1 Idaho, 276.

The next ground of the motion goes to the sufficiency of the undertaking on appeal. The undertaking is for costs on appeal and also for a stay of execution of the judgment. That part of the undertaking containing the obligation of the sureties to pay the damages and costs is as follows: "Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, R. P. Chattin, Mountain Home, Elmore county, Idaho, and C. Hein of Mountain Home, Idaho, do hereby jointly and severally undertake and promise on the part of the appellants, that the same appellants will pay all damages and costs which may be awarded against them on the appeal not exceeding three hundred dollars (\$300), to which amount we acknowledge ourselves jointly and severally bound." It will be observed from that quotation that "the sureties obligate themselves to pay all damages and costs which may be awarded against them (appellants) on the appeal not exceeding \$300." The question arises whether that clause is a sufficient compliance with the provisions of section 4809, Revised Statutes, which requires the undertaking on appeal to be executed "to the effect that the appellant will pay all damages and costs which may be awarded against him on an appeal or on a dismissal thereof." Would it be contended that said undertaking is sufficient, if it was to the effect that the appellant would pay all damages and costs which may be awarded against him "on a dismissal" of such appeal? I think not. There are clearly two things that the sureties must obligate themselves to do, and the first is, they must undertake and promise on the part of the appellant that he will pay all damages and costs which may be awarded against him on appeal; and second, that the appellant will pay all damages and costs which may be awarded against him on a dismissal of the appeal; and if either of said obligations

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or promises is omitted from the undertaking, it is not sufficient under the provisions of said section of our statute. The sureties have the right, and it is the law that they may stand on the terms of their bond, and as said section of our statute particularly and specifically provides that the obligation of the bond must be such as obligates the sureties, in case their principal does not pay, to pay "all damages and costs" which may be awarded against him on the appeal or on a dismissal thereof. If either of those requirements is omitted from the bond, it is clearly insufficient, but may be amended upon seasonable application.

The first ground of the motion to dismiss the appeal is "That no sufficient undertaking on said appeal was ever filed in said cause." Under a well-established rule that the motion should specify with particularity the precise ground upon which the moving party will base his right to the relief sought, that ground in said motion is not sufficiently specified. The ground that no sufficient undertaking on said appeal or said cause was ever filed is so indefinite and uncertain that the opposing counsel is compelled to pick out certain grounds upon which he supposes his adversary intends to rely. It is the duty of the party to state his grounds specifically, and if he fails to do so, the court ought to disregard the motion. (*Omaha etc. Co. v. Chauvin-Fant etc. Co.*, 18 Mont. 468, 45 Pac. 1087; 14 Ency. of Pl. & Pr. 136, and long list of cases cited. See, also, *Estee's Pleading*, 4th ed., sec. 4401; *Sawyer & Briggs v. Schoonmaker*, 8 How. Pr. 198; *Bailey & Southard v. Lane*, 21 How. Pr. 475; *Perkins v. Mead & Brook*, 22 How. Pr. 476; *State v. Fry*, 10 Mont. 407, 25 Pac. 1055; *Donnelly v. Struven*, 63 Cal. 182; *Freeborn v. Glazer*, 10 Cal. 337; *Loucks v. Edmondson*, 18 Cal. 203; *De Stafford v. Galrey*, 15 Colo. 32, 24 Pac. 580. See, also, *Wilson v. Wetmore*, 1 Hill (N. Y.), 216; *Scholfield v. Pope*, 103 Ill. 138; *Archer v. Long*, 35 S. C. 585, 14 S. E. 24; *Garrett v. The K. C. Coal Min. Co.*, 111 Mo. 279, 20 S. W. 25; *Succession of Theriot*, 114 La. 611, 38 South. 471; *Hermann v. Hutcheson*, 33 Or. 239, 53 Pac. 489; 3 Cyc. 1956.) In 3 Cyclopedia it is said: "A motion to

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dismiss should set out the facts on which it is based, and point out the specific defects or errors complained of. General allegations of defects or errors not accompanied by brief or argument are insufficient." It is only fair to opposing counsel for the moving party to place his finger upon the specific defect complained of in the undertaking or other instrument which he attacks. Formal defects in the undertaking, if there are any, are waived unless properly objected to. (1 Spelling on New Trial and Appellate Practice, sec. 748.) We refer to this matter in order that the attention of the practitioners in this state may be called to it and they may govern themselves accordingly. One who relies upon technicalities should be held to observe technicalities.

However, the appellant has filed another undertaking on appeal in place of the one against which this motion was made, and it was suggested on the oral argument that that undertaking was as objectionable as the first, and upon an examination of it, we find that it is defective in the same particular. The attention of counsel for appellant was called to the insufficiency of the second undertaking on the oral argument, and he has made no application to file another undertaking. The motion, therefore, must be granted and the appeal dismissed, with costs in favor of the respondent.

Ailshie, J., concurs.

STOCKSLAGER, C. J.—I cannot concur in the conclusion reached by my associates in this case wherein it is held that the conditions of the bond are insufficient to bind the sureties in case the appeal is dismissed. I think the language of the bond is entirely sufficient to hold them in case of a dismissal of the appeal. The obligation is that the bondsmen "undertake and promise on the part of the appellants that the same appellants will pay all damages and costs which may be awarded against them on the appeal, not exceeding \$300, to which amount we acknowledge ourselves jointly and severally bound." It is true that section 4809, Revised Stat-

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utes, requires that the sureties should obligate themselves to pay all damages and costs that may be awarded against them on the appeal or on a dismissal thereof. I am at a loss to understand how an appeal could be dismissed without carrying with it the cost of the appeal, and that is what the bond in this case requires. What standing would the bondsmen have in a court of justice in case suit was instituted to collect the cost of appeal in case of a dismissal thereof, pleading that they only obligated themselves that the appeal should be prosecuted to a successful or adverse determination? Is it possible that the bondsmen in this case did not fully understand that when they signed the bond the obligation was that in case the appellant was defeated in any manner on the appeal they would pay all costs and damages in case appellant failed or refused to do so? I think not. The construction given to the language of our statute, that is, the latter part of section 4809, by my associates, is not in harmony with section 4231; it says: "The court must in every stage of the action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties." To hold that the bondsmen could escape liability in case of the dismissal of the appeal in this case is in violation of section 4231, *supra*. As I view it, this section was enacted to avoid such errors as appear in this bond. I concur in the conclusion reached, with the exception as above indicated.

Argument for Applicant.

(June 23, 1906.)

EUREKA MINING, SMELTING AND POWER COMPANY et al., Appellants, v. LEWISTON NAVIGATION COMPANY et al., Respondents.

[86 Pac. 49.]

APPOINTMENT OF RECEIVER PENDING APPEAL—WASTE—FAILURE TO INSURE—REMOVAL OF PROPERTY FROM JURISDICTION.

1. Where a mortgage provides that the mortgagor shall keep the property insured, and that in case he fails to do so the mortgagee may insure, and that all sums paid by the mortgagee for insurance shall become a part of the mortgage debt and be secured by the mortgage lien, a failure to insure by the mortgagor will not amount to such waste of the security as to authorize the appointment of a receiver to take charge of the property.

2. Where A takes a mortgage on a boat that is plying on an interstate stream in such manner that its use in navigating such stream must necessarily take it beyond the jurisdiction of the state in which the mortgage was executed, and it is stipulated in the mortgage that the mortgagor shall not remove the "vessel beyond the limits of the United States," a removal beyond the jurisdiction of the state and its use in navigation of a portion of the same stream where it is no more dangerous or perilous will not constitute grounds for the appointment of a receiver to take charge of the property, where it appears that the vessel is in charge of a competent and skillful captain and crew.

3. Where a mortgage provides that the mortgagee shall insure a boat which it is understood shall ply on certain designated waters, and he fails to do so for the reason that the risk is so great on a vessel plying on those waters that insurance cannot be obtained, the failure of the mortgagor to insure will not of itself warrant the appointment of a receiver for such property.

(Syllabus by the court.)

ORIGINAL application for appointment of a receiver pending appeal. *Application denied.*

John O. Bender and K. I. Perky, for Applicant.

It was a want of good faith on the part of the mortgagors to neglect to pay the taxes and insurance upon the property,

Argument for Applicant.

and yet remain in possession and appropriate all the profits of the use of the estate to their own purposes. (*Winkler v. Madgeburg*, 100 Wis. 421, 76 N. W. 332, 335.)

A receiver will be appointed where there is even imminent danger of waste to realty; it follows that where actual waste is being perpetrated or a continued neglect to properly preserve the mortgaged personal property exists, like a failure to keep it insured, a receiver should be appointed. (*Kelly v. Steele*, 9 Idaho, 141, 72 Pac. 887.)

The plaintiffs are entitled to a receiver on this ground alone, that the property is in danger of being removed, and it is immaterial whether the property be sufficient to discharge the mortgage debt; it is only necessary to add to the statutory ground that the condition of the mortgage has not been performed. (*Clark v. Brown*, 119 Fed. 132; *High on Receivers*, par. 9; *State v. District Court*, 22 Mont. 241, 56 Pac. 281; *Loaiza v. Levy*, 85 Cal. 11, 20 Am. St. Rep. 197, 24 Pac. 707, 9 L. R. A. 376.)

A receiver might not be appointed merely because the mortgagor failed to provide insurance, but the property is in very great danger of being lost, and there is no other property out of which to satisfy the indebtedness. The fact that the property covered by the mortgage is personalty, and not realty, should not be lost sight of. (*Jones v. Quayle*, 3 Idaho, 640, 32 Pac. 1134; *Alderson on Receivers*, sec. 422; 17 Ency. of Pl. & Pr., 731 et seq., and notes and cases therein cited.)

A receiver will be appointed where there is fraud or bad faith on the mortgagor's part in the management of the property, as in appropriating rents and profits to other purposes than in keeping down the interest on the encumbrances. (2 *Jones on Mortgages*, sec. 1533; *Smith on Receivership*, p. 278.)

Where the mortgagor refused to pay interest and taxes and so forth on the mortgaged property, and the plaintiffs, upon discovering such facts, applied to the trustee to take action, and the trustee had failed and neglected to take any steps, a case was made for the appointment of a receiver. (*Putnam v. Jacksonville etc. R. Co.*, 61 Fed. 440.)

Argument, contra.

It is held in *Sacramento etc. R. R. Co. v. Superior Court of San Francisco*, 55 Cal. 456, under a statute exactly like ours, that a receiver may be appointed in an action to enforce the specific performance of the terms and conditions of a mortgage.

This court has jurisdiction over the subject matter of this suit. (*Bogart v. The Steamboat John Jay*, 17 How. 399, 15 L. ed. 95; *Schuchardt v. Barbage*, 19 How. 239, 15 L. ed. 625; *Rood v. Reartt (The Lottawanna)*, 21 Wall. 583, 608, 22 L. ed. 654; *Britton v. The Venture*, 21 Fed. 928.) This court has jurisdiction to appoint a receiver, although the property is beyond the jurisdiction of Idaho. (High on Receivers, 3d ed., p. 43; *Bayne v. Brewer Pottery Co.*, 82 Fed. 394; Alderson on Receivers, sec. 428.) And to compel the defendants to bring the property within the state. (5 Rose's Notes on U. S. Reports, p. 474, and collection of cases.)

C. H. Lingenfelter, *contra*.

When personal property, which at the time is situated in the given state, is mortgaged by the owner, and the mortgage is duly executed and recorded in the mode required by law, so as to create a valid lien, the lien remains good and effectual, although the property is removed to another state, either with or without the consent of the mortgagee, and although the mortgage is not rendered in the state to which the removal is made; the mortgage lien is given effect, however, in the state to which the property is removed solely by virtue of the doctrine of comity. (*Shepard v. Hynes*, 104 Fed. 449, 45 L. R. A. 271, 52 L. R. A. 678.)

It is error to appoint a receiver in any of the cases mentioned in section 4329, Revised Statutes of Idaho, where the equities of the complaint are fully denied by the answer, and the evidence introduced by plaintiff on the hearing of the application for the appointment of such receiver is fully met and overcome by counter-evidence introduced by the defendant. (*Sweeney v. Mayhew*, 6 Idaho, 455, 56 Pac. 85; High on Receivers, 3d ed., sec. 24; *Crombie v. Order of Solon*,

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157 Pa. St. 588, 27 Atl. 710; *Buchanan v. Comstock*, 57 Barb. 568.)

In this proceeding the equities of the plaintiff's complaint are fully denied by the affidavit, which takes the place of the answer. (17 Ency. of Pl. & Pr. 741, and cases cited; *White House v. Point Defiance R. R. Co.*, 9 Wash. 558, 38 Pac. 152; *National Park Bank v. Godard*, 131 N. Y. 494, 30 N. E. 566; *Williamson v. Monroe*, 3 Cal. 383.)

It may be stated as a general rule that a receiver of mortgaged property, or of the rents and profits thereof, will never be appointed where the security is adequate and the receivership is not necessary for its preservation. (23 Ency. of Law, 2d ed., p. 1028.)

When a party is clothed with title and possession such as are conferred by a lease in writing, and is in the enjoyment of rights apparently legal, a receiver will not be appointed unless under urgent and peculiar circumstances. (*Chicago Oil etc. Co. v. United States Petroleum Co.*, 57 Pa. St. 83, 91.)

AILSHIE, J.—This is an original application made in this court for the appointment of a receiver pending an appeal and determination thereof. The original action out of which the application arises was commenced in the district court in and for Nez Perce county, for the foreclosure of a mortgage for \$10,000 on a steamboat plying on the Snake river, known and registered as the "Mountain Gem." The plaintiffs applied for the appointment of a receiver pending the action, and the application was granted by the district judge, and a receiver was accordingly appointed. Thereafter, the defendant, C. F. Allen, applied to the court for a dissolution of the order and discharge of the receiver, and after a hearing and the submission of various affidavits on behalf of both plaintiffs and defendants, the district judge made and entered an order discharging the receiver. The plaintiffs immediately filed and served their notice of appeal to the supreme court, and executed and filed an undertaking on such appeal. They thereafter caused a certi-

fied copy of the papers and files used on the hearing in the lower court to be filed in this court, and on that showing applied here for the appointment of a receiver pending the determination of the case on appeal. This application is made under section 9, article 5 of the constitution as construed in *Chemung Min. Co. v. Hanley*, 11 Idaho, 302, 81 Pac. 619. In that case it was said that: "This court has the power to appoint a receiver to act pending the litigation."

The material facts necessary to an understanding of the issues presented here are as follows: The plaintiff, Eureka Mining, Smelting and Power Company, is a Washington corporation engaged in mining operations on the upper Snake river and somewhere above Lewiston, while the defendant, Lewiston Navigation Company, is an Idaho corporation, with its principal place of business at Lewiston, organized and existing for the purpose of constructing and operating boats on the Snake river. The navigation company appears to have constructed the "Mountain Gem" at an expense of some \$30,000; \$10,000 of this sum was loaned to the navigation company by various parties as follows: By the Eureka Mining, Smelting and Power Company, \$7,328; by the plaintiff H. M. Peterson, \$500.00; by the plaintiff J. A. Husebye, \$172, and the balance of \$2,000 by the defendant C. F. Allen. On January 27, 1904, the navigation company executed and delivered to the defendant C. F. Allen four promissory notes for the total sum of \$10,000, one for the sum of \$7,328, one for \$500, one for \$172, and one for \$2,000, and at the same time executed and delivered to and in favor of Allen a mortgage on the "Mountain Gem," apparently in conformity with maritime law, to secure the payment of these several notes. All of these notes were due and payable one year after date, and the mortgage contained the following stipulation: "But if default be made in such payments, or in any one of such payments, or if default be made in the prompt and faithful performance of any of the covenants herein contained, or if the said party of the second part shall at any time deem himself in danger of losing said debt, or any part thereof, by delaying the

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collection thereon until the expiration of the time above limited for the payment thereof, or if the said party of the first part shall sell or attempt to sell said property or any part thereof, or if the same shall be levied upon or taken by virtue of any attachment or execution against said first party, or if said first party shall remove, or attempt to remove, said vessel beyond the limits of the United States, or if said first party shall suffer and permit said vessel to be run in debt to an amount exceeding in the aggregate the sum of ——— dollars, or if said first party shall negligently or willfully permit said property to waste, damage, or destruction, said party of the second part hereby authorized to take possession of said goods, chattels, and personal property at any time, wherever found, either before or after the expiration of the time aforesaid, and to sell and convey the same, or so much thereof as may be necessary, to satisfy the said debt, interest, and reasonable expenses, after first giving a notice of thirty days, to be given by publication in some newspaper published in the city of Lewiston, state of Idaho, and to retain the same out of the proceeds of such sale; the surplus (if any) to belong and to be returned to said party of the first part." It also contained a stipulation requiring the mortgagor to keep the property insured against fire and marine risks. All these notes, except the one for \$2,000, were indorsed by Allen and delivered by him to the equitable owners thereof. At the same time the notes and mortgage were executed, and apparently concurrently therewith, the navigation company executed and delivered to the defendant Allen a lease on the "Mountain Gem" for a term of five years. This lease contains numerous provisions and stipulations, none of which have been considered especially important here except the following: "The said lessee shall run said boat for the development of the upper Snake river country, and shall return same to the said lessor upon expiration of this lease, or upon its termination for any reason herein provided, in good condition; natural wear and tear excepted, excepting also damages or loss by fire, or contact with rocks, or other reasons beyond the control of said les-

see." The lessee, Allen, operated the boat on the Upper Snake river from the date of the execution of the lease until the twenty-fifth day of August, 1905, at which time the water became so low that it was impossible for the boat to run on the river above Lewiston, or even between Lewiston and Riparia. In the latter part of October, 1905, the boat appears to have been taken down the Snake river from Lewiston to what is commonly known in that section of the country as the lower river, where it has ever since been operated and was being operated at the time this action was commenced. While the lease was executed at the same time as the notes and mortgage, still the plaintiffs do not appear to have been parties to that instrument, although it is quite clearly established that they were, in fact, cognizant of its execution and of the contents thereof. They also knew, and have ever since known, that the defendant Allen was the lessee and in control of and operating this boat. It also appears that the lessee was to considerable expense in constructing piers and docks and in operating the boat, and operated the same at a continuous loss until after he removed it to the lower river. On the lower river he appears to have been running the boat at a profit. In the meanwhile no payment whatever was made by the mortgagor, the navigation company, or anyone else, on these several notes; neither did the company nor anyone else cause the boat to be insured. In fact it is stated in one of the affidavits on behalf of the plaintiffs "that there is no insurance on said boat, and none can be had thereon as the risk is too great, and the rate of insurance thereon would be prohibitive." It will be remembered that the provisions of the mortgage required the mortgagor to keep the property insured. It would, however, appear self-evident that if the "risk is too great" and the rate of insurance too high for the mortgagees to procure insurance on the property, it would have been equally "prohibitive" on the mortgagor.

This application appears to be based on two propositions: (1) That the mortgaged property has been removed out of the jurisdiction of the court; (2) That the mortgaged prop-

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erty is in danger of being destroyed on account of being operated in dangerous and perilous waters. It is contended by counsel for defendant that since the boat had already been removed from the jurisdiction of this state prior to the commencement of the action, that therefore the court could not appoint a receiver to take charge of the property on the ground that "it was about to be removed." The trial judge appears to have taken the same view of the case. We cannot agree with such a view as to the powers of a court of equity to appoint a receiver. While it is a well-recognized principle that a receiver appointed by the courts of one state has no standing, except by comity, in the courts of another state (note to *Straughan v. Hallwood*, 8 Am. St. Rep. 49), still it is quite equally as well established that where all the parties interested in the property and having control over it are personally present in court, the court may, and often should, appoint its receiver to take charge of the property, and may in that manner reach the property through orders made upon the person of the litigant. (Anderson on Receivers, sec. 428; High on Receivers, sec. 46; note to *Booth v. Clark*, 17 How. 322, 15 L. ed. 164; 5 Rose's U. S. Notes, p. 474.)

On the second ground urged by the petitioners it is contended that the failure to insure amounts to a neglect on the part of the mortgagor to preserve the property and is in effect waste. It is argued that the failure to pay taxes and the necessary insurance to preserve and protect the property amounts in equity to waste, and in support of this position we are cited to *Winkler v. Madgeburg*, 76 N. W. 332. In that case the court said: "The payment of taxes and the cost of insurance is necessary to preserve the property. Equity devolves it upon him who has the use. Not to pay them is waste." It should be observed that in that case the mortgagor was insolvent, and had made an assignment for the benefit of his creditors, and that it was considered very doubtful by the trial court if the property was sufficient to pay the mortgage debt. It also appeared that Madgeburg, the assignee for the benefit of creditors, was receiving the rents

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and profits from the property and was failing to pay taxes and insurance. The facts of that case abundantly justify the conclusion reached by the court, but the case clearly did not require the court to go to the extent of holding that a failure to pay taxes and insurance amounted *per se* to waste. It should be noted that in the case at bar the mortgage authorizes the mortgagee to pay insurance in case the mortgagor failed to do so and charge the same up against the mortgagor as a part of the mortgage debt, for which the mortgagees would acquire a lien under their mortgage. Under such a state of facts a court would not be justified in saying that a failure to meet these requirements would amount to waste and justify the appointment of a receiver. On the other hand, they would undoubtedly be proper circumstances for the consideration of a court of equity in connection with such other facts as appeared in the Winkler-Madgeburg case.

Again, it is urged by counsel for plaintiffs that the property has been removed from the jurisdiction of the state, and is in great danger of being destroyed on the rocks in the lower Snake river, and it is argued that either of these facts is sufficient to justify the appointment of a receiver. In the first place it is a matter of which we take judicial notice that the Snake river does not enter the state of Idaho at any point in the northern division thereof, and that its nearest approach is to mark the western boundary of the state. The vessel could not ply on the Snake river above Lewiston without being as often in the jurisdiction of Washington as in Idaho. It could not ply on the river below Lewiston without passing into the state of Washington and entirely beyond the jurisdiction of this state. These facts were known to all of the parties at the time of the execution of the mortgage, and it was provided in the mortgage that the vessel should never be taken "beyond the limits of the United States," which was itself a recognition of the fact that it would necessarily have to be taken beyond the jurisdiction of Idaho. While the lease provided that the lessee should "run said boat for the development of the upper Snake river country,"

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this was not a part of the mortgage contract, and was not a condition of the security given the creditors, and its violation, if its true intent has been violated, would not be a breach of the mortgage contract. We are forced to the conclusion that the removal of the vessel to the lower river, under the circumstances shown by these affidavits, was not such a violation of the terms of the contract as to justify the appointment of a receiver to take charge of the property. Now, as to the contention that the removal of the vessel to the lower river endangers its safety and threatens its loss and destruction. It is shown by the affidavits, and even in the absence of such a showing, we would be justified in taking notice of the fact, that the perils and dangers of navigation in the Snake river above Lewiston are greater than in the same stream below Lewiston, or in that part of the river commonly referred to in that section of the state as the lower river. It is conceded by the parties to this action that the boat was constructed for the purpose of navigating the Snake river, and that the vessel cost the sum of \$30,000, and it is quite clear that it is worth somewhere about \$25,000 at the present time. Such a property is only valuable for one purpose, and that is navigation. So soon as it is taken out of commission and tied up at the docks for any considerable length of time its value begins to depreciate. If the property is in danger of loss or destruction in navigating the lower river, it would certainly be in much greater danger on the upper river. It is quite conclusively shown that the vessel is in charge of a most competent and skillful seaman and navigator with a competent crew of men. Under these facts and circumstances the question thus arises: Is the "Mountain Gem" in greater danger of loss or destruction while plying on the lower river than it would be if brought to the upper river, where the plaintiffs and petitioners here contend that it should ply and where they would have the court's receiver operate the boat? We think under these circumstances the dangers are rather diminished than augmented. All of the parties to this action are chargeable with knowledge of the class and character of property upon which the mortgage

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was given, and the nature and character of the stream on which it was to ply, and the consequent perils and dangers to which such property would necessarily be subjected. They are also chargeable with notice and knowledge that the Snake river is subject to its periods of low water when vessels cannot ply upon certain portions thereof. Those perils and dangers are no greater now than they were when this mortgage was executed. It is also worthy of note here that the notes and mortgage were past due before this action was commenced, and that the action was not instituted in fact because of a breach of the condition for insurance or any other condition of the mortgage than failure to make payment when due. While other conditions are charged as a ground for the appointment of a receiver, the gist of the action is the failure to make payment when due. The defendant Allen has made a tender of one year's interest on this mortgage, and while the property is shown to be worth in the neighborhood of \$25,000, there is only \$8,000 principal due these plaintiffs. The property is, therefore, abundantly sufficient to respond to any judgment and decree of foreclosure which may be obtained against it. While the property is subject to many dangers and perils, those risks are no greater apparently now than they were when the mortgage was executed. Many authorities touching the various phases of this case have been cited by the respective counsel, but we do not think it necessary or profitable to review them here. After a full and careful consideration of the entire showing made, we are satisfied that we should deny the application for appointment of a receiver pending appeal. The application is denied, and costs thereof awarded in favor of the respondent, Allen.

Stockslager, C. J., concurs.

Sullivan, J., did not sit at the hearing and took no part in the decision.

Argument for Appellant.

(June 26, 1906.)

STATE, Respondent, v. D. J. WILLIAMS, Appellant.

[86 Pac. 53.]

**CRIMINAL PRACTICE—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT—
NEWLY DISCOVERED EVIDENCE—HORSE COLT SUBJECT OF LARCENY.**

1. Where it is shown that W. took into his possession a colt belonging to K. and branded such animal, claiming it to be his property, and on a trial upon the charge of grand larceny he is found guilty as charged, the judgment will not be reversed where it is shown that all the facts connected with the alleged larceny were before the jury, and that the evidence was sufficient to warrant the verdict.

2. Upon application for a new trial on the ground of newly discovered evidence, a new trial will not be granted unless due diligence is shown, and that it is probable a different result might follow another trial.

3. An information that charges the unlawful and felonious taking of a "gray horse colt" charges grand larceny under section 7048, Revised Statutes.

(Syllabus by the court.)

APPEAL from District Court of Bingham County. Hon. James M. Stevens, Judge.

Appellant was charged with the crime of grand larceny, was tried, convicted and sentenced. He appeals from the judgment and from an order overruling a motion for a new trial.

Bowen & Watson, for Appellant.

The defendant's explanation of his possession was reasonable and fair, and amply corroborated and uncontradicted in every respect, and should not have been disregarded. (*State v. Seymour*, 10 Idaho, 712, 79 Pac. 825.) The greater part of the newly discovered evidence was not cumulative under

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the definition of the same by this court. (*Flannagan v. Newberg*, 1 Idaho, 78.)

The statute, section 7048, Revised Statutes, by implication excludes colts from the list. Why was it necessary to specifically include the young of cattle and specifically exclude the young of horses? It is true that the word "horses" is a general term, and would by itself probably include the young. But why did the legislature exclude colts from the list?

J. J. Guheen, attorney general, Edwin Snow and Philip R. Hindman, for Respondent.

The weight to be given to an explanation by the defendant of his possession of recently stolen property is exclusively for the jury. (*State v. Ireland*, 9 Idaho, 686, 75 Pac. 257.)

Newly discovered evidence which is merely cumulative is not ground for a new trial. (*People v. Biles*, 2 Idaho, 114, 6 Pac. 120; *State v. Davis*, 6 Idaho, 159, 53 Pac. 678.) Affidavits alleging newly discovered evidence are of no avail when it appears that such evidence simply tends to the impeachment or contradiction of witnesses upon immaterial matters. (*State v. Hardy*, 4 Idaho, 478, 42 Pac. 507.)

The information alleges the felonious taking of a horse colt. The word "colt" simply describes in a way the age of the horse.

STOCKSLAGER, C. J.—The defendant was charged with the larceny of one gray horse colt, the property of Henry S. Woodland. On his trial he was convicted of the crime of grand larceny and thereafter sentenced to serve a term of three years in the state penitentiary. A motion for a new trial was filed and denied. The appeal is from the judgment as well as from the order overruling the motion for new trial. The record discloses five assignments of error as follows: 1. "The court erred in denying appellant's motion for a new trial for the reason that the verdict was contrary to the evidence and wholly insufficient to support the ver-

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dict. 2. The court erred in denying appellant's motion for a new trial for the reason that the verdict was contrary to and against law, and contrary to the instructions given by the court. 3. The court erred in denying appellant's motion for a new trial on the ground of newly discovered evidence. 4. The court erred in refusing to permit appellant to ask the following question of the witness George S. Davis: 'I will ask you if it is not the practice of the people living in that neighborhood to turn their stock on the Asylum pasture?' 5. The court erred in passing sentence and rendering judgment for the reason that the information does not allege facts sufficient to constitute a public offense."

It will be observed that the assignments above quoted largely refer to the insufficiency of the evidence to support the verdict. Learned counsel who made the oral argument in this court on behalf of the appellant with commendable ability and, we are satisfied, the best of faith, insisted that the evidence was not of a character that should warrant a conviction. There is no claim of conflicting evidence disclosed by the record. The possession is not questioned. That appellant took the colt alleged to have been stolen from the range or a pasture that seems to be somewhat of a public one known as the "Asylum" pasture, near the town of Blackfoot, to his own premises a short distance from the pasture, and branded it with his own brand, is admitted by appellant. That the colt was taken from the pasture by appellant and his three sons about 9 o'clock in the morning, and driven along a well-traveled highway to the premises of appellant, where it was branded, is not contradicted. With these undisputed facts before the jury, it was only necessary for it to determine appellant's good faith in branding the colt in controversy. It is shown by the record that appellant claimed to have traded for a gray horse colt and a brown mare colt in the fall of 1904, with a man by the name of Weaver, and that he kept them on his premises during the winter of 1904-05. He says he took possession of them in September, 1904, and last saw them about the middle of April, 1905. He further says that the reason he did not see

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the colts later than that last spring was because about the latter part of April he went off to work for the Wood Livestock Company and returned about the 1st of June. Again he says: "What led me to think them (the colts) were mine was this: Late last fall the mare got into a wire fence and she had cut her leg, and I knew them by this cut on the mare colt. She cut her leg in front crosswise of the left hind leg. I saw such a mark on the brown mare colt." On cross-examination he testified: "I knew this man Weaver about three months. It was about three months from the time I first saw him until I got the horses. As soon as I got the colts he left the country. Never heard of him again. I did not get a bill of sale of these colts. They were not branded at the time I got them." Again, on cross-examination he says: "The road that runs past my house is not a road that is traveled very frequently. It is not a public highway through the country. It is not traveled by the Indians. They don't use it as a regular road." Frank Martin testified, among other things, as follows: "I have resided in this county about three years. I was born in Montana. I am a half-breed Indian, Shoshone Tribe. . . . I know Mr. Williams, the defendant, just by sight. I have known him about two years. I know a man by the name of Weaver. He is my wife's stepfather. I have known this man Weaver about three years. . . . I do not know where he is now. . . . I know something about Weaver owning a brown mare colt and a gray horse colt. The gray colt is an iron gray horse colt. I don't know when it was born. I should say the colt would now be fifteen or sixteen months old. . . . It had a white stripe on its face. The brown colt was a mare colt. Its age would be about the same as the other. . . . I paid particular attention to these colts because they had been promised to me by Weaver. . . . He disposed of these colts to Mr. Williams." On cross-examination he said: "I was not present when I claim Mr. Weaver disposed of these colts; of my own knowledge I don't know what he did with them." On redirect examination he says: "I only saw the colts once during the time they were in the possession of Weaver."

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George McDaniels testified that: "He was going on twenty years old and had resided in Blackfoot all his life. My occupation has been riding principally. . . . I know the defendant. . . . I know something about a gray and brown colt that Mr. Williams had. . . . I last saw them along in the early part of last spring. I saw them in his corral. I saw them off and on all winter. I never took any particular notice of them, although I knew them. I noticed them so I could describe them. . . . To the best of my knowledge they were the same colts I saw in Mr. Williams' possession last spring." Describing the brown mare colt he said: "She was a brown mare colt with a stripe in her face that run a little above her eyes, and she had a cut on her left hind leg. The scar ran pretty nearly around the leg from the inside to the outside."

Tom Lyons testified he had lived in Blackfoot twenty-two years. "I ride the range for myself. . . . I have seen on his place a gray and brown colt. I last saw them last spring somewhere about the 1st of April. I did not take particular notice of them. I could not describe them in any respect no more than one was gray and the other was brown. I know the gray one was a horse."

In rebuttal, George S. Davis testified: "I am familiar with the stock of defendant and have been for two years. I saw his horses during that time nearly every day. Their pasture joins my pasture. I never saw in the defendant's pasture or under his control two colts similar to the colts in question. I never saw a gray colt. I never saw a brown mare colt in his possession, similar to the brown mare colt I testified to."

Charles Sims testified he was acquainted with the brown mare colt claimed by the prosecuting witness. "I have been acquainted with it since it was foaled. I owned the mother of the colt. I owned it until January. I parted with title of the colt to Mr. Woodland."

The prosecution had traced the ownership and possession of the colts from the time they were foaled down to the time they were branded by appellant, and we think sufficiently to establish beyond a reasonable doubt that the gray colt was

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the property of the prosecuting witness, Woodland, and at no time had been the property of appellant. In view of all the facts and circumstances disclosed at the trial, the question for the jury to determine was: Whether appellant honestly believed the gray colt in question was his property at the time he drove it from the Asylum pasture to his own premises and then branded it. If so, under the instructions given them by the court, it was their duty to return a verdict of not guilty. On the other hand, if the jury believed from the evidence and circumstances disclosed by the trial that appellant knowingly took the property of another from the Asylum pasture, or elsewhere, to his own premises and there placed his brand upon the colt in controversy, thereby claiming the ownership and right to the possession of such colt, under the instructions of the court he was guilty of grand larceny, and it was their duty to so find by their verdict. It is apparent from the record and the verdict of the jury that the explanation of appellant of all his acts in connection with the possession and branding of the colt in controversy was not satisfactory. The jury had the opportunity of carefully weighing the evidence of each and all the witnesses who were before them. They were impaneled for the express purpose of passing upon all disputed questions of fact, and were instructed that they should give the defendant the benefit of every doubt, and unless satisfied beyond a reasonable doubt of his guilt, they should acquit him. We find nothing in the record indicating that there was any bias or prejudice against appellant in Bingham county, the place of trial, or that he did not have a fair and impartial trial at the hands of the twelve citizens of that county who composed the jury; hence, under the repeated decisions of this court, as well as all courts throughout the country where the jury system prevails, this verdict should not be disturbed on appeal, unless it is apparent that there has been an abuse of the trust imposed in the lower court or jury, which is not disclosed by the record in this case.

There is no complaint on behalf of counsel for appellant that the instructions given by the court were not fair and

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correctly stated the law. The only complaint we find in the record pertaining to the admission or rejection of evidence is assignment No. 4. It is disclosed by the record that the Asylum pasture was used quite generally by people having stock in that vicinity, and we do not see how any harm could have followed an answer to the question, to wit: "I will ask you if it is not the practice of the people living in that neighborhood to turn their stock in on the Asylum pasture?" Neither do we see how any answer, no difference what it may have been, could have benefited appellant; hence, if error, it was harmless, and in no way could entitle appellant to a new trial.

The third assignment is based on the refusal of the court to grant a new trial on the ground of newly discovered evidence. Several affidavits are filed in support of this application, as well as a number in many respects contradicting statements contained in the affidavits in support of the application.

Evaline Wilde, a girl eleven years old at the time she makes the affidavit, testifies that in the fall of 1904 she saw two colts running in the pasture of appellant; that they frequently got into the field of her father, who lives near the Williams' farm, or did at that time; that at frequent intervals she, with others, had occasion to drive the colts out of her father's field; that on one occasion the brown colt attempted to jump a barbed-wire fence and hung on the wires and cut its leg—she thinks the hind one. She describes the colts as one a gray and the other a brown.

A. O. Belleville testified that he had a horse in the pasture of appellant in the fall of 1904, and on different occasions visited the pasture to see how his horse was doing; that he noticed in the pasture a gray colt; also a brown one; and that the brown colt had a bad cut near the hock joint on one of its hind legs which caused it to hobble as it walked, and that he paid particular attention to said colts on account of the severity of said cut. Other witnesses testified to seeing colts, a gray and brown, on the premises of appellant in the fall of 1904. In rebuttal of these affidavits, a number

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of affidavits are filed contradicting statements contained in the affidavits filed on behalf of appellant. As we view the showing made by counsel for appellant and the counter-showing made by the prosecuting attorney, the jury, in case a new trial were granted, would be left in about the same position as the one that heard the case before. Witnesses testify that the colts seen on the Williams premises were what is known as "Cayuse" stock, whilst the colts claimed by the prosecuting witness that were branded by appellant were of a better grade or quality of animals. Even though sufficient diligence were shown, we do not think we would be justified in awarding a new trial on the showing made, considered with the counter-showing. This is especially true where such applications are largely within the discretion of the trial court.

In *State v. Hardy*, 4 Idaho, 476, 42 Pac. 507, this court said: "Affidavits alleging newly discovered evidence are of no avail when it appears that such evidence simply tends to the impeachment or contradiction of witnesses upon immaterial matters." See, also, *People v. Biles*, 2 Idaho, 114, 6 Pac. 120; *State v. Davis*, 6 Idaho, 159, 53 Pac. 678, in which the question of newly discovered evidence is discussed.

There is no merit in appellant's sixth assignment that "the court erred in passing sentence and rendering judgment, for the reason that the information does not allege facts sufficient to constitute a public offense." It is urged that the charge being the larceny of "one gray horse colt," it is not included within the term "grand larceny" as defined by section 7048, Revised Statutes, which provides, among other things, the taking a "horse, mare, gelding," etc. It is said "the section by implication excludes colts from the list." We do not so construe this section of the statute. In order to constitute grand larceny, the felonious taking of any domestic animal constitutes the crime without regard to value, and the word "colt" merely described the age of the animal. If it were true, as urged by counsel for appellant, that for the reason the statute does not in words mention a colt, the taking is not larceny, one might steal a band of them, or a band of lambs,

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or as many pigs as he could conveniently handle, and yet not be guilty of larceny. The judgment is affirmed.

Sullivan, J., concurs.

AILSHIE, J., Dissenting.—It is difficult to understand how a jury, uninfluenced by anything other than the evidence that appears in this record, could have returned a verdict of conviction. But conceding the sufficiency of the evidence to justify the verdict, the defendant on his motion for a new trial has produced affidavits of witnesses that it is clearly shown he knew nothing of prior to the trial, which affidavits show facts most material to his defense. The theory of the state all the way through the case appears to have been that the defendant never, in fact, owned the two animals he claimed to have lost, and that he claims to have taken up and branded. The affidavits on motion for a new trial show quite conclusively that the defendant did have two such animals, and that the resemblance was so marked that some of the witnesses were unable to distinguish between them. This was shown by as many as five witnesses. One witness, Thomas Hines, testified to having told the prosecutor that he would testify to these facts soon after defendant's arrest, and he went with the prosecutor to see the animals and called his attention to the marked resemblance; but defendant does not appear to have been apprised of this until after the trial, when he sent his attorney to Chehalis, Washington, to interview the witness. Evaline Wilde, a child of eleven years old, makes affidavit that during the fall of 1904 these colts got into her father's field, and that she drove them out, and the brown colt cut its leg on the barbed wire. This was a most material fact, as the defendant had identified the animal by this wire cut. It is also strange that the prosecuting witnesses themselves had never noticed this wire cut on the animal until the defense called their attention to it. It shows how easily witnesses can be mistaken in their identification of growing range animals. With this showing it seems to me that a new trial ought

Argument for Appellant.

to be ordered; it would enable the defendant to present all his evidence, and, if innocent, vindicate himself; and, on the other hand, the state in this particular case could suffer no possible prejudice by a new trial if the defendant is in fact guilty, as his guilt could as easily be shown on another trial.

(June 26, 1906.)

STATE, Respondent, v. ZIBE MORSE, Appellant.

[86 Pac. 53.]

GRAND LARCENY—RECEIVING STOLEN PROPERTY—INSUFFICIENCY OF EVIDENCE—NEWLY DISCOVERED EVIDENCE.

1. Where the facts and circumstances established on the trial show that the stolen cattle had been gathered on the range by others and driven some distance, and the defendant met those who had gathered them, by agreement, and assisted them in mutilating the brands on the cattle and driving them across Snake river into Oregon, the verdict of guilty will not be reversed on the ground of insufficiency of the evidence.

2. Held, that the court did not err in refusing to grant a new trial on the ground of newly discovered evidence.

(Syllabus by the court.)

APPEAL from the District Court of the Seventh Judicial District for Washington County. Hon. Frank J. Smith, Judge.

The defendant was convicted of grand larceny and sentenced to imprisonment for six years. *Affirmed.*

Hawley, Puckett & Hawley, for Appellant.

The larceny became complete when the cattle were driven from the place where found by parties other than the defendant. (*People v. Myer*, 75 Cal. 383, 17 Pac. 431.)

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The bare possession of property recently stolen is not conclusive evidence of guilt. Especially is this so of property of the kind involved in this case. (*State v. Seymour*, 7 Idaho, 257, 61 Pac. 1033.) California has decided that receiving stolen property is a distinct and specific offense under a section identical with section 7057, Revised Statutes of Idaho, and that although a defendant may receive stolen property and assist in disposing of it for the benefit of himself and the real thief, he cannot be convicted either of larceny or as an accessory after the fact, but must be tried for the offense of receiving the stolen property only. (*People v. Stokem*, 40 Cal. 499; *People v. Fagan*, 98 Cal. 230, 33 Pac. 60; *People v. Ribolsi*, 89 Cal. 492, 26 Pac. 1082.) We submit that the affidavit of Nicholas is not cumulative, and shows upon its face that it could not have been produced at the trial. (*State v. Davis*, 6 Idaho, 159, 53 Pac. 678.)

J. J. Guheen, Attorney General, Geo. P. Rhea, County Attorney of Washington County, and E. P. Rhea, for Respondent.

SULLIVAN, J.—The defendant was convicted of the crime of grand larceny and sentenced to a term of six years' imprisonment. Three errors are assigned: 1. The insufficiency of the evidence to justify the verdict; 2. Admitting certain evidence; 3. In overruling the motion for a new trial.

It is contended by counsel for appellant that the defendant had nothing to do with the cattle, for the larceny of which he was convicted, except to assist in driving them after they had been stolen by others. It appears from the record that the cattle were taken from their range by two other parties and driven some distance before the defendant appeared on the scene and assisted in driving them; that at a certain place near Snake river the defendant went with one of the parties and drove the cattle to a corral about 12 o'clock at night. The next morning they went to work changing the brands; that the defendant assisted in that work. After changing

Points Decided.

the brands they drove the cattle across Snake river into Oregon.

It is contended by counsel for the defendant that as he did not assist in starting the cattle or in taking them from their range, if he is guilty of anything, it is of receiving stolen property. We cannot agree with that contention. Taking the evidence all together, it clearly shows that the defendant knew they were stolen cattle and assisted in driving them away. The evidence is amply sufficient to support the verdict.

It is contended that the court erred in not granting a new trial on the ground of newly discovered evidence. It appears that one of the persons who assisted in stealing the cattle testified against the defendant on the trial, and thereafter made an affidavit to the effect that he had testified falsely on the trial against the defendant. From an examination of that affidavit we are satisfied that there was no error in denying a new trial. As we find no error in the record, the judgment is affirmed.

Stockslager, C. J., and Ailshie, J., concur.

(June 27, 1906.)

In re BERT PROUT.

[86 Pac. 275.]

HABEAS CORPUS—PAROLE OF PRISONERS—CONDITION OF PAROLE—RETURN OF PRISONER—SERVICE OF FULL TERM.

1. The board of pardons is a branch of the executive department of the state government and its powers and prerogatives, as such, are those of granting clemency to convicted prisoners, and it has no power to increase or extend penalties or punishments pronounced by the sentence of a court.

2. The board of pardons has power to parole prisoners upon such terms and conditions as they may see fit, so long as those terms and conditions are neither immoral nor illegal.

Argument for State.

3. Conditions attached to a parole or pardon by the board of pardons that are to extend beyond or be performed after the expiration of the term for which the prisoner was sentenced, are illegal and cannot be enforced after the expiration of the term for which the prisoner was sentenced.

4. A prisoner who had been paroled by the board of pardons and thereafter rearrested and returned to the penitentiary is entitled to his discharge at the expiration of the period of time for which he was sentenced by the court, and he cannot be lawfully detained under such sentence for the purpose of serving an additional term equaling the time he was out on parole.

(Syllabus by the court.)

ORIGINAL application for a writ of *habeas corpus*. Writ granted and case heard on return made by the warden of the penitentiary. *Prisoner discharged.*

Carl A. Davis, for Petitioner.

Where a prisoner is released on parole and the term of his sentence is not specifically suspended, it continues to run and expires as it would had he served his term in the manner originally intended. The parole is a change of manner of punishment only and not a suspension of the sentence. (*Woodward v. Murdock*, 124 Ind. 444, 24 N. E. 1047; *West's Case*, 111 Mass. 443.)

The statutes of Idaho provide that before the good time allowed by law is taken from a convict, charges must be made by the warden and sustained by the board of prison commissioners. (Idaho Code, 1901, secs. 5864, 5868.)

It is not shown by the state that any charges were made and sustained against Prout to justify the warden in depriving him of the six months' good time otherwise allowed by law.

J. J. Guheen, Attorney General, and Edwin Snow, for the State.

The parole agreement in this case is in the nature of a conditional pardon. The power to grant conditional pardons is expressly granted to the board by the constitution. (Idaho

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Const., art. 4, sec. 7; *Fuller v. State*, 122 Ala. 32, 82 Am. St. Rep. 17, 26 South. 146, 45 L. R. A. 502; *In re Conditional Discharge of Convicts*, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658.)

Any condition that is not immoral or impossible to perform is valid. That the prisoner leave the state is a lawful condition attached to a pardon. (*State v. Barnes*, 32 S. C. 14, 17 Am. St. Rep. 832, 10 S. E. 611, 6 L. R. A. 743; *People v. Potter*, 1 Park. Cr. Rep. 47; *State v. Addington*, 2 Bail. (S. C.) 516, 23 Am. Dec. 150.)

AILSHIE, J.—The petitioner was on the eighteenth day of May, 1903, sentenced to serve a term of three years in the state penitentiary for the crime of embezzlement, the judgment providing that the term of imprisonment should commence to run from the date of his delivery to the warden of the penitentiary. He was received at the penitentiary on the twenty-fourth day of May, 1903, and continued upon the service of his sentence until the sixth day of October, 1904, on which date he was released by the board of pardons on parole, under sections 13 and 14 of the act of February 2, 1899 (Sess. Laws 1899, pp. 11, 12). His parole carried with it various and sundry conditions and requirements as to his movements and conduct during his absence from the penitentiary. It required him to remain within the state and within the confines of certain counties therein designated; that he should make a written report to the warden on the first day of each and every month, stating his employment or occupation, the amount of his earnings, and an itemized account of his expenditures, and that such report should be certified by his employer or those for whom he had worked, and that he might be returned to the penitentiary at the will and upon the demand of the board of pardons, and concludes with the following language: "And upon his return he shall serve out the full unserved time of his original sentence, without any commutation of time." The prisoner was returned to the penitentiary on the second day of March, 1905, on the grounds that he had violated the provisions of his parole.

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The board ordered his good time credit forfeited, and also the period of four months and twenty-six days that he was out on parole forfeited, and directed that he enter upon the original sentence and serve it in full as though he had never been released. The three year sentence would have expired on May 24, 1906, without giving him any credit for good time; but under the direction of the board his sentence would not expire after his return to prison until the twentieth day of October, 1906. It is now nearly one month over three years since the prisoner was delivered to the warden of the penitentiary, and he applies for his discharge on *habeas corpus*, upon the ground that the term of his sentence has expired, and that neither the warden nor the board of pardons has any legal right to further detain him.

It is contended by counsel for the state that under section 7 of article 4 of the constitution the board of pardons are granted full power and authority to do the acts and things complained of in this case. That section of the constitution provides, among other things, as follows: "The governor, Secretary of State, and attorney general shall constitute a board to be known as the board of pardons. Said board or a majority thereof shall have power to remit fines and forfeitures, and to grant commutations and pardons after conviction and judgment either absolutely or upon such conditions as they may impose in all cases of offenses against the state except treason or conviction on impeachment." Act of February 2, 1899 (Sess. Laws 1899, pp. 11, 12), which prescribes the manner and method and conditions for paroling prisoners, provides, in section 13 thereof, "that such convict while on parole shall remain in the legal custody and under control of the board of pardons, and subject at any time to be taken within the inclosure of the said penitentiary, and full power to retake and reimprison any convict so upon parole is hereby conferred upon said board, whose written order certified by the warden shall be sufficient warrant for all prisoners named in it."

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It is urged by the attorney general that the board of pardons may impose any conditions whatever upon the granting of a parole. That proposition is correct, and is the well settled and uniform rule of law as adopted both in this country and in England, and was, indeed, the rule of the common law. (4 Blackstone's Commentaries, 401; *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 395; *United States v. Wilson*, 7 Pet. 150, 8 L. ed. 640; *Ex parte Wells*, 18 How. 307, 15 L. ed. 421; *State v. Smith*, 1 Bail. (S. C.) 283, 19 Am. Dec. 679; *Lee v. Murphy*, 22 Gratt. 789, 12 Am. Rep. 563; *Ex parte Marks*, 64 Cal. 29, 49 Am. Rep. 684, 28 Pac. 109; *Kennedy's Case*, 135 Mass. 48; *State v. Wolfer*, 53 Minn. 135, 39 Am. St. Rep. 582, 54 N. W. 1065, 19 L. R. A. 783; 24 Am. & Eng. Ency. of Law, 2d ed., 566.) This rule is subject to the same restrictions which attach to the official acts and conduct of all public officials, namely, that they must not be immoral or illegal. There can be no doubt but that under the constitution and statute as above cited the board of pardons may, upon the granting of a pardon, commutation or parole, attach such conditions as they see fit, so long as they are not immoral, illegal or impossible of performance, provided they are to be kept and performed or complied with during the term for which the prisoner was sentenced by the judgment of the court. Under our constitution it is the duty and prerogative of the legislative department to define crimes and fix the maximum and minimum penalty that may be imposed for the commission thereof. It is the duty of the judicial department to try offenders against those laws, and, upon conviction, to sentence them under the statute. Under the laws of this state, there is no such thing as an indefinite or indeterminate sentence as is provided for in many of the states from which authorities have been cited by the attorney general. In this state the sentence and judgment of the court must be specific, certain and definite. The board of pardons belongs to the executive department of the state, and its privilege and prerogative is that of granting clemency. It is a board of clemency rather than a punitive body. Instead of pronouncing judgment and sentence and

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imposing punishment, its prerogative and authority is that of forgiving offenses and remitting penalties—wiping out judgments and sentences of conviction either in whole or in part. Whenever such board undertakes to increase or extend the penalty or punishment imposed upon a convict by a decree of court, they at once pass beyond the realm of their jurisdiction and authority, and infringe upon the judicial power of the state. It is urged, however, that this imprisonment does not amount to an increase or extension of the judgment of the court, for the reason that the prisoner was at large and enjoying his liberty during the four months and twenty-six days that he was out on parole, and that the sentence was during that time merely suspended. It seems to us that that contention is fully answered by section 13 of the statute above quoted, wherein it provides that the prisoner shall be under the control of the board of pardons, and shall report to the warden from time to time. It was also required, as we have heretofore seen, by the terms of the parole, that he should remain in a certain designated territory and constantly report his movements, employment, etc., to the warden. This contention is very fully and ably answered by the court in *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047, where the chief justice says: "During the time that he was out on parole he was not a free citizen; he was, as we have seen, still a prisoner, and notwithstanding his prison bounds were not so contracted as were the prison bounds of the insolvent debtor, at the time our laws recognized imprisonment for debt, still he was given prison bounds. He was not permitted to come into the state of Indiana. All the consequences of the judgment were upon him, except that he had leave of absence from the prison. As the appellant was a prisoner absent from the prison by proper authority, under no view of the case, in our opinion, could his imprisonment be continued longer than the period for which he was sentenced less his credit for good time. But if the appellant is to be regarded as having been a free man during the time he was out of prison on parole, he was entitled to his release at the time this pro-

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ceeding was instituted. It was only by virtue of the judgment of the Marion criminal court that the appellant was held as a prisoner; it by its very terms only condemned him for five years from its date, less any time for which, under the law, he might be entitled to credit." (*West's Case*, 111 Mass. 444.)

Some of the cases cited by counsel for the state contain dicta to the effect that there is no limit to the conditions that may be imposed by the pardoning power upon paroling or pardoning a convict. But those statements are in most cases made in the consideration of questions other than the one presented in this case.

In *Fuller v. State*, 122 Ala. 32, 82 Am. St. Rep. 17, 26 South. 146, 45 L. R. A. 502, it was held by the Alabama court that the statute of that state in express terms provided that in case the prisoner should be returned he should enter upon the service of his original sentence the same "as though no parole had been granted him."

In *re Conditional Discharge of Convicts*, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658, there is an extended discussion of this question and the citation of many authorities, but a careful examination of that case shows that the statute of Vermont provided for what the court of that state designates an "indeterminate" sentence. Upon conviction of the accused, the trial court seems to merely pronounce the maximum and minimum term of imprisonment, and after the prisoner has served the minimum term, it is left to the discretion of the pardoning power as to when he shall thereafter be discharged prior to serving out the maximum sentence.

Conlon's Case, 148 Mass. 168, 19 N. E. 164, is not in point here, for the reason that at the time that case was decided there was a statute in Massachusetts providing that in case of the return of a prisoner who had been paroled that "in computing the period of his confinement, the time between his release upon said permit and his return to the reformatory shall not be taken to be any part of the term of the sentence."

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In *People v. Cummings*, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285, the court had under consideration a statute authorizing an indeterminate sentence where the court could merely pronounce the maximum and minimum penalty, and the remainder was left to the determination of the pardoning power. The court held such an act unconstitutional as being an infringement upon the judicial power of the state.

It certainly cannot be said that a man is a free man enjoying the liberty and freedom usually accorded other citizens when he is compelled to confine his movements to a specified locality and to report his conduct, his daily labor, his earnings and expenditures from time to time to a prison official, and is subject and liable at any day—and without notice, or the right of trial or the right to apply to the courts—to be taken to the state penitentiary and there imprisoned and confined at the will of designated officials. Such a view of the constitution and statute would amount to turning what the framers of the constitution intended to be a board of clemency into a board of punishment. It seems to us that in maintaining such a view we would lose sight of the purposes of the parole statute. That statute was never intended as a vindictive or punitive statute, but rather as a reformatory measure. It was intended that a prisoner who had served out one-third of his term and had made a good record as a prisoner might be put on his good behavior and word of honor, and that so long as he might keep his promise he could go free, and that whenever he violated the terms and conditions thereof he might be subject to return to serve out the remainder of the term for which he was sentenced. We find that some of the authorities have entered into many refinements and nice distinctions in the definition of pardon, commutation and parole. We think it clear, however, that whatever distinction may be drawn, and whatever definition may be given, that they are all acts of clemency, and are grants emanating from the executive department of the state without compensation or consideration from the recipient. It appears equally

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clear to us that a pardon, either absolute or conditional, is not effective until received and accepted. In so far as a clemency has once been received and enjoyed, it would seem impossible to recall or revoke it. The revocation could only extend to that part not yet enjoyed. Pardon or executive clemency is a gift. One who promises to make a gift may keep his promise in whole or part or he may decline entirely, but after the delivery he cannot recover the thing given, and even if he should again come into possession of it he cannot retain it. (1 Page on Contracts, sec. 281.) He may decline at any time he pleases to give any more, but that fact does not divest the donee of title to that which he has already received. In that view of the case, while the pardoning board would have unquestionable authority to recall their parole and return the prisoner at any time, it seems equally clear that they cannot wipe out or obliterate the clemency the prisoner has already received and enjoyed. It would seem strange if they can turn round and punish him the same length of time that he has been enjoying their clemency.

The term for which the prisoner was sentenced having expired, the warden has no authority for his further detention. It is therefore ordered and adjudged that the prisoner be forthwith discharged.

Stockslager, C. J., concurs.

SULLIVAN, J., Dissenting.—I am unable to concur in the conclusion reached by a majority of the court. I shall not discuss whether a parole is a conditional pardon or not, as I do not think that question very material here, and the only question of importance in this case is, whether the board of pardons exceeded its powers in imposing in the parole of the petitioner the following provision—"and upon his return he shall serve out the full unserved term of his original sentence without any commutation of time." Is that a condition that may be imposed by said board? In section 7 of article 4 of the constitution of Idaho, we find, among others, the following provision: "Said board, or a majority thereof, shall have

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the power to remit fines and forfeitures, and to grant commutations and pardons after conviction and judgment, either absolutely or upon such conditions as they may impose, in all cases of offenses against the state except treason or conviction on impeachment. The legislature shall by law prescribe the sessions of said board and the manner in which application shall be made and regulate the proceedings thereon."

It is conceded by the majority, under certain authorities cited in the majority opinion and under our constitution and statute, as follows: "There can be no doubt but that under the constitution and statute as above cited, the board of pardons may, upon the granting of a pardon, commutation or parole, attach such conditions as they see fit so long as they are not immoral, illegal or impossible of performance, provided they are to be kept and performed or complied with during the term for which the prisoner was sentenced by the judgment of the court." They then proceed to hold that the above-quoted provision of the parole agreement was illegal because, as I understand them, they claim it increases the term of imprisonment of the petitioner. I do not maintain that the board would have power or authority, under said provision of the constitution, to make a valid parole agreement with a prisoner who had been convicted and sentenced to imprisonment for a term of years, that in case he violated his parole agreement, he might be arrested and hung for the violation of such agreement. But what I do maintain is, that the board has authority to require the convict to serve out the unexpired part of his term, in case he violates his parole; that he shall have no credit for the time he was out on parole, but must serve his entire term, in case of a violation thereof. As I view it, that condition is not immoral, impossible, nor is it illegal, and is not in violation of any provision of our statutes. I think it a very reasonable provision in such an agreement and one authorized by said provision of our constitution. The people of this state have spoken through the state constitution to the board of pardons, and said to them that in granting commutations, "you

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may grant them absolutely or upon such conditions as you may impose." In commenting upon *Fuller v. State*, 122 Ala. 32, 82 Am. St. Rep. 17, 26 South. 146, 45 L. R. A. 502, my brothers say: "That the statute of that state in express terms provided that in case the prisoner should be returned, he should enter upon the service of his original sentence the same 'as though no parole had been granted.' " And in commenting on *Conlon's Case*, 148 Mass. 168, 19 N. E. 164, they say that that case is not in point here, for the reason that at the time the case was decided, there was a statute in Massachusetts providing that in case of the return of a prisoner who had been paroled there, "in computing the period of his conviction, the time between his release upon said permit and his return to the reformatory shall not be taken to be any part of the term of the sentence." Thus the comments of my associates upon those cases would indicate that the legislature had the power to impose the terms there stated; but that as the legislature of this state had enacted no statute authorizing that condition in the parole agreement, the board did not have the power to impose it. I recognize the fact that this state has no statute in that regard, such as Alabama and other states have, where the legislatures of the several states have provided in express terms that in case a prisoner violates the terms of his parole, he may be returned to prison and serve out his sentence "as though no parole had been granted him." Can it be possible that the legislature has greater power in this state in prescribing conditions on which a prisoner may be paroled than the people authorized by the constitution and conferred on the board of pardons? The people of the state have spoken directly to the board of pardons and said, you may grant commutation and pardons after conviction and judgment, either absolutely or upon such conditions as you may impose, and the legislature shall, by law, prescribe the sessions of said board and the manner in which applications for pardon shall be made, and may regulate the proceedings thereon. That is the extent of legislative power. We have in section 7, article 4 of

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the constitution a power imposed on the board of pardons to grant parole upon such conditions as they may impose, and in the same section the people have said to the legislature, you shall prescribe the sessions of said board and the manner in which application shall be made and regulate the proceedings thereon. The people by their constitution have prescribed in that section what the legislature may do in regard to paroles and pardons, and by provisions of said section have given the legislature certain authority therein and have prohibited the legislature from interfering in any manner with the "conditions" that may be imposed by said board in granting paroles. It is declared in section 2, article 1 of the constitution that all political power is inherent in the people, and my brothers, by their conclusions in this matter, would hold that, regardless of said provisions of the constitution, the legislature of this state has the power to limit the board of pardons in imposing conditions on paroled prisoners. They thus hold that the creature, the legislature, has greater power than the people, the creator. I cannot concur in that conclusion. So far as I have investigated, the constitutions of none of the states from which decisions have been cited have a similar provision in their constitution as said section 7, article 4 of the constitution of Idaho, and if they have, the acts of the several legislatures of those states, giving the pardoning power authority that it had under the constitution, would only be a work of supererogation, and not void. We find in said section 7 a grant of power to the board of pardons, and we find in the same section a prohibition on the legislature from prescribing in any manner the conditions that may be imposed by the board on the paroled prisoner. In the opinion of the judges in the *Matter of the Conditional Discharge of Convicts*, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658, the court said: "The authorities seem to agree that, when a convict fails to perform the conditions of his pardon, he is liable to be remitted to his original sentence. This is the only logical result, for by nonperformance of the conditions the pardon becomes void, and the prisoner is in the

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same state in which he was at the time his pardon was granted." Can it be possible that the authorities agree upon that proposition and have not held such a condition of the parol illegal? It seems they have. In those states the sentence and judgment in a criminal case must be specific, certain and definite, the same as in our own state. A parole is not an increase of the sentence. In the Vermont case above cited, the court refers to the case of *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 395, where the conditions were that during the remainder of the convict's term of sentence he should refrain from the use of intoxicating liquors, use all proper exertion for the support of his mother and sister, and not be convicted of any criminal offense against the laws of the state, with the further condition that upon the failure to comply therewith, he should be subjected to summary arrest upon the warrant of the governor, and thereon be remitted to his former custody to serve the remainder of the term of his sentence. The Vermont court said: "Reference might be made to pardons containing certain other and different conditions, but it is unnecessary. In the light of the authorities, what good reason can be given why the governor, under his constitutional powers, may not grant a parole with all the conditions intended by the law to be imposed by the board of prison commissions with like effect?" That question is answered by holding that there is no good reason why those conditions may not be imposed. There the pardoning board had the authority to impose that condition, and the question was as to whether the governor had the same power. But my brothers would say that Iowa has a statute authorizing those conditions. Can an illegal, immoral or impossible condition be made effective by legislative enactment? If the legislature has the authority by statute to authorize the board to impose these conditions, the people themselves certainly have the power, through their constitution, to grant that power to the board of pardons. Granted that the people did not intend by the said provision of the constitution to give the board of pardons power to impose on paroled convicts illegal, immoral, or impossible conditions; the condition in the par-

Points Decided.

don under consideration is not illegal, immoral or impossible, and therefore the pardoning board had the right and authority granted them direct from the people to impose it. The prisoner should be remanded.

(June 29, 1906.)

SHOSHONE COUNTY, Plaintiff, v. WILLIAM SCHULTZ,
Treasurer, Defendant.

[86 Pac. 418.]

**PAYMENT OF WARRANTS DRAWN ON SPECIAL FUND—CURRENT EXPENSES
OF COUNTY GOVERNMENT.**

1. Under the act of March 10, 1903 (Sess. Laws 1903, p. 204), providing for the annexation of a portion of Shoshone county to Nez Perce county, as construed in *Shoshone County v. Thompson*, 11 Idaho, 130, 81 Pac. 73, and *Shoshone County v. Proffit*, 11 Idaho, 763, 84 Pac. 812, warrants drawn by Nez Perce county in favor of Shoshone county for the proportionate part of indebtedness to be borne by the detached territory are payable out of a special fund to be raised from taxation, and the cash received by Nez Perce county from Shoshone county from money on hand at the time of annexation is not available for the payment of such warrants.

2. The cash received from money in the treasury at the time of annexation was available for the payment of current expenses and intended to compensate Nez Perce county for its outlay in maintaining county government in the annexed territory during the time for which it could not levy and collect taxes from that territory.

(Syllabus by the court.)

ORIGINAL application for writ of mandate to the treasurer of Nez Perce County. *Writ denied and action dismissed.*

James E. Gyde, Prosecuting Attorney of Shoshone County,
for Petitioner.

B. S. Crow, Prosecuting Attorney of Nez Perce County, for
Defendant.

Opinion of the Court—Ailshie, J.

Counsel cite no authorities not cited in the decision.

AILSHIE, J.—This is an application for a writ of mandate made on the part of Shoshone county against the treasurer of Nez Perce county. It is the latest action growing out of the act of March 10, 1903 (Sess. Laws, 1903, p. 204), which provided for the annexation of a portion of Shoshone county to Nez Perce county. That act has previously been twice before this court, and was construed first in *Shoshone County v. Thompson*, 11 Idaho, 130, 81 Pac. 73, and again in *Shoshone County v. Proffit*, 11 Idaho, 763, 84 Pac. 812. The accountants provided for in the act, in discharging their duties as construed in *Shoshone County v. Thompson*, found the sum of \$3,414.29, to be the proportionate sum due from Shoshone county to Nez Perce county out of the moneys in the county treasury at the time the act took effect. That sum was paid into the county treasury of Nez Perce county at the time the county commissioners drew their warrants in favor of Shoshone county for the amount found due that county. This action was brought to compel the treasurer of Nez Perce county to pay this sum of \$3,414.29 toward the satisfaction of the warrants drawn by Nez Perce county, in accordance with the decision of this court in *Shoshone County v. Proffit*. In the latter case this court said: "The issuance and delivery of warrants by Nez Perce county to Shoshone county is merely an evidence of the result of the investigation and adjustment of the amount found due to Shoshone county from the territory it has lost. These warrants will be payable only out of taxes collected from the annexed territory in the manner and under the requirements and restrictions of section 3606, Revised Statutes, *supra*." The money which it is sought by this action to have paid on these warrants is not money collected in the manner prescribed by statute and pointed out by the decision of this court. It was never intended by the legislature that Shoshone county should pay its proportion of the cash on hand into the treasury of Nez Perce county and immediately have it paid back on the warrants issued for the de-

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tached territory's proportionate part of indebtedness. To do so would be a useless thing. It certainly could not have been the intention of the legislature to require the accountants to go to a great amount of work and certify their results in a matter that was to have no consequence or bearing on the standing of either the old county or the detached territory, and which would be entirely useless in every sense and respect. We think rather that it was the intent of the legislature to have Shoshone county pay into the Nez Perce county treasury the proportionate amount of cash on hand at the time of the annexation, in order to compensate Nez Perce county for the amount of expenditures and outlay it would be to in the way of current expenses for maintaining county government in the annexed territory for the remainder of the fiscal year, for which it would be unable to collect taxes from the new territory. Under the view we have previously taken of the situation, as expressed in *Shoshone County v. Proffit*, *supra*, we are satisfied that Shoshone county is not entitled to have this sum paid on the warrants issued by Nez Perce county. The writ is denied and the action dismissed. No costs awarded.

SULLIVAN, J., Concurring.—The decision of this court in *Shoshone County v. Proffit* is the law of that case, and, in consideration of that fact, I concur in the decision in this case.

Stockslager, C. J., was not present at the hearing, but participated in the consideration of the case, and concurs in this decision.

(June 30, 1906.)

CHARLES E. THUM, Respondent, v. JEREMIAH W
BAILEY, Appellant.

[86 Pac. 279.]

UNDERTAKING ON APPEAL—SUFFICIENCY OF—UNCERTAINTY.

1. Where two appeals are taken and only one undertaking on appeal given, without reciting to which appeal it applies, the same is void for uncertainty, and such appeals will be dismissed on motion.

(Syllabus by the court.)

APPEAL from the District Court of the Fourth Judicial District for Elmore County. Hon. Lyttleton Price, Judge.

Action to determine the ownership of mining claims. Judgment for the plaintiff. *Motion to dismiss appeal sustained.*

M. G. Cage and Hawley, Puckett & Hawley, for Appellant, cite no authorities on the point decided.

F. S. Dietrich and Wyman & Wyman, for Respondent.

No sufficient undertaking on appeal was filed in this cause, upon the appeal from the judgment or from the order overruling the motion for new trial, the undertaking filed being fatally ambiguous. (*Baker v. Railway Co.*, 8 Idaho, 361, 66 Pac. 806; *Wallace v. McKinley*, 6 Idaho, 95, 53 Pac. 104; *Kelly v. Leachman*, 5 Idaho, 521, 51 Pac. 407, and cases cited.)

SULLIVAN, J.—This is an appeal from the judgment and the order denying a new trial. Counsel for respondent has made a motion to strike out part of the transcript and also a motion to dismiss the appeal on two grounds. In our view of the matter it will be necessary for a determination of the case to decide one of the points raised by the motions, and that is the sufficiency of the undertaking on the appeals, one ap-

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peal being from the judgment and one from the order denying a new trial.

In the preamble of the undertaking is recited the fact that the appeals are from the judgment and the order overruling the motion for a new trial, and the obligation is as follows:

“Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, do hereby jointly and severally undertake and promise on behalf of the defendant that the said defendant will pay all damages and costs which may be awarded against defendant on the appeal, or a dismissal thereof, not exceeding the sum of \$300, three hundred dollars, for which amount we acknowledge ourselves jointly and severally bound.”

This court has held in many cases that where an appeal is taken both from the judgment and from the order denying a new trial, and it is recited in the obligation of the undertaking that the obligors undertake and promise that the appellant will pay all damages and costs awarded against him on the “appeal or a dismissal thereof,” it is void for uncertainty, and that a motion to dismiss the appeal must be sustained. (*Motherwell v. Taylor*, 2 Idaho, 139, 9 Pac. 417; *Kelly v. Leachman*, 5 Idaho, 521, 51 Pac. 407, and authorities there cited; *Baker v. Oregon Ry. & Nav. Co.*, 8 Idaho, 36, 66 Pac. 806.)

On the authority of those cases the appeal must be dismissed, and it is so ordered, with costs in favor of respondent.

Stockslager, C. J., and Ailshie, J., concur.

Points Decided.

(June 30, 1906.)

HUGH E. MCELROY, Administrator of the Estate of JOHN G. WHITNEY, Deceased, Plaintiff and Appellant, v. W. G. WHITNEY, Surviving Partner, Defendant and Appellant.

[88 Pac. 349.]

DEATH OF PARTNER—DUTY OF SURVIVING PARTNER—APPOINTMENT OF REFEREE—POWER AND DUTY OF REFEREE IN REPORT—COURT MAY ADOPT REPORT OF REFEREE AS ITS FINDINGS—SALARY MAY BE ALLOWED SURVIVING PARTNER WHEN.

1. Upon the death of one partner, the surviving partner may continue the partnership business by and with the consent of the executor or administrator of the estate of the deceased and the approval of the probate court.

2. Unless by consent of the executor or administrator of the estate of the deceased partner, and the approval of the probate court, it is the duty of the surviving partner to settle the affairs of the copartnership as speedily as the best interests of the business of the copartnership will permit.

3. Where the complaint and answer pray for the appointment of a referee to take an accounting of the affairs of the copartnership and report his findings to the court as to the indebtedness of one to the other, and such report or findings show such indebtedness, and that all of the partnership affairs have been considered by the referee, the court may adopt such findings as the findings of the court.

4. Whilst the general rule is that the surviving partner is not entitled to a salary or compensation for managing and settling up the partnership business, it has its exceptions when a partnership has been carried on for some time after a dissolution by death, and such continuance has proved to be beneficial.

(Syllabus by the court.)

APPEAL from the District Court in and for Elmore County. Hon. Lyttleton Price, Judge.

Plaintiff commenced his action for an accounting. Referee appointed and reported in favor of plaintiff. Report and

Argument for Appellant.

findings adopted by the court and judgment rendered accordingly. Both plaintiff and defendant appeal. *Affirmed.*

Richards & Haga, for Appellant Whitney.

Where the court fails to find on all the material issues, the judgment must be reversed. (*Wood v. Broderson, ante*, p. 190, 85 Pac. 490; *Standley v. Flint*, 10 Idaho, 629, 79 Pac. 815.)

In case of reference, the parties are entitled to a statement from the referee of all the items of account between them, in order that either may, if he thinks proper, except to any particular item. The referee should state the account in detail, by items, times, dates, etc., and show the items claimed as well as those allowed. It is not sufficient on such a reference to report the testimony *en masse*, and the amounts in the aggregate, with no reference to items claimed and disallowed. (*Gage v. Arndt*, 121 Ill. 491, 13 N. E. 138; *Dewing v. Hutton*, 40 W. Va. 521, 539, 21 S. E. 780; *McCampbell v. McClung*, 75 N. C. 393; *Sharpe v. Eliason*, 116 N. C. 665, 21 S. E. 401; *Brockman v. Aulger*, 12 Ill. 277; *Craig v. McKinney*, 72 Ill. 305; *Ransom v. Winn*, 18 How. 295, 15 L. ed., 388; *Newcomb v. White*, 5 N. Mex. 435, 23 Pac. 671; *O'Neil v. Perryman*, 102 Ala. 522, 14 South. 898; *Hurdle v. Leath*, 63 N. C. 366; *Cameron v. Bank*, 4 Tex. Civ. App. 309, 23 S. W. 334; *Pack v. Mighell*, 3 Wash. 737, 29 Pac. 556; 24 Am. & Eng. Ency. of Law, 2d ed., 234; 17 Ency. of Pl. & Pr. 1037; *Gapen v. Gapen*, 41 W. Va. 422, 23 S. E. 579; *Nims v. Nims*, 20 Fla. 204.)

The findings referred to in the order of reference do not mean findings as to what items should be allowed or disallowed either party. It shows clearly that the referee was to report to the court the result of his examination of the books and the taking of the account, and that upon the account having been taken, properly classified and balanced, the court itself would make such findings and enter such judgment as would be proper in the premises. The order directing the accounting

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was based upon the decision in *Bradshaw v. Morris*, 20 Mont. 214, 50 Pac. 554.

The Montana statute on this question is practically identical with ours. (See, also, *Murphy v. Patterson*, 29 Mont. 575, 63 Pac. 375.)

Frank Martin and Hugh E. McElroy, for Appellant McElroy.

It is the correct practice in suits for an accounting to dispose of all matters in bar of an accounting before the account is stated or a reference ordered. The ordinary decree in an accounting case is that an account shall be taken. (1 Ency. of Pl. & Pr. 102.)

As nothing in bar of the accounting was stated in the answer, the court entered its interlocutory decree directing an accounting. This decree amounts to an absolute disposition of the issues made by the pleadings, and nothing remains but the accounting. The reference was "the whole issue," and this included the making of the findings. There was no other issue left in the case. (Idaho Rev. Stats. 1901, secs. 3493, 3494.)

Our law requires the surviving partner to promptly close up and settle the partnership business. (Rev. Stats. 1901, sec. 4216.)

The general rule is well established that the surviving partner is entitled to no salary as surviving partner. He can only charge for services outside the scope of the partnership business. (*Loomis v. Armstrong*, 49 Mich. 521, 14 N. W. 505; *Starr v. Case*, 59 Iowa, 503, 13 N. W. 645; *Brown's Appeal*, 89 Pa. St. 139.)

STOCKSLAGER, C. J.—This is an appeal from the district court of Elmore county. The action was commenced in Canyon county and transferred to Elmore county for trial, the reason for which is not shown by the record. It is shown by the complaint that John G. Whitney, deceased, and W. G. Whitney were general partners doing business at the town of

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Payette, under the name and style of the Payette Nursery. That on or about the fourth day of January, 1891, John G. Whitney died intestate, and that on the seventh day of October, 1901, the probate court of Ada county duly issued to plaintiff letters of administration upon the estate of said decedent; that he duly qualified. That upon the death of John G. Whitney, defendant W. G. Whitney took possession and control of the copartnership, as surviving partner, for the purpose of settling the affairs of the partnership, and except as herein admitted has failed and neglected and refused to account to plaintiff and his predecessors or to the personal representatives of said decedent. The copartnership property is set out in the complaint: "That the interest of this estate in the nursery stock, notes, accounts, personal property and indebtedness due said partnership at Payette, Idaho, as plaintiff is informed and believes, was of great value, to wit, of the value of more than \$20,000."

The eighth allegation is: "That the plaintiff is informed and believes said defendant has received from the property of said decedent, in the possession of defendant, as surviving partner, more than the sum of \$17,441.63 in money, and has accounted to the said estate for not more than the sum of \$12,441.63, and affiant states upon information and belief that the said defendant has failed and neglected to account to plaintiff or to the personal representatives of the estate of John G. Whitney, deceased, for a large balance of indebtedness due said partnership in notes and accounts, the exact amount thereof being to plaintiff unknown; and plaintiff alleges upon information and belief that the defendant has failed, neglected and refused to account to plaintiff or to the personal representative of said decedent, for the sum of more than \$5,000, received by the defendant as surviving partner as aforesaid, the same being property of and belonging to the estate of said decedent John G. Whitney."

The ninth allegation is: "That plaintiff has demanded an accounting from said defendant and the payment to plaintiff of the money in the hands of defendant, prior to the com-

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mencement of this action, particularly on the twenty-second day of March, 1902, and at numerous times prior to said date, and that the defendant has failed, neglected and refused to make such accounting or to pay said money to plaintiff."

The tenth allegation is: "That at the time of the death of said decedent said defendant was indebted, as plaintiff is informed and believes, to the said decedent and to the said partnership to the amount of more than \$2,984 (the exact amount thereof being to plaintiff unknown), on account of money of the said partnership received by defendant and converted to his own use."

The eleventh allegation is: "That, as plaintiff is informed and believes, defendant has failed to account to the estate of said decedent for a large amount of nursery stock of the value of more than \$3,000, and has failed to account for a large amount of personal property, consisting of notes and accounts, the value being to plaintiff unknown, and that plaintiff has reason to believe and therefore alleges that defendant has received into his possession a large amount of property of said estate, the exact nature and character of which is to plaintiff unknown, and that defendant should be required to disclose the same and account therefor to this plaintiff."

The next allegation is that upon information and belief no settlement of the said copartnership business or accounts has ever been made between said defendant and plaintiff or the personal representatives of decedent, and that although requested to make such settlement, defendant refuses to come to a final settlement with respect thereto, and has also refused to render to plaintiff any account of the property of the said partnership in the hands of defendant as surviving partner. Then follows prayer for an accounting of all copartnership dealings and transactions from the time of the commencement thereof to the time of dissolution by the death of John G. Whitney.

An answer was filed to this complaint putting in issue all the material allegations thereof, and then alleges that on or about April 1, 1889, the deceased, Whitney, and defendant

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had a full and complete settlement and accounting of all matters between the said decedent and defendant in writing, signed by said decedent and defendant, and then prays judgment as follows:

First. "That an account may be taken of all the said partnership dealings and transactions from the first day of April, 1889, to the time of the dissolution by the death of said deceased, John G. Whitney, and of the money received and paid by said partners respectively in regard thereto, and that an account may be taken of all dealings and transactions with regard to the property, assets and effects of said firm since its dissolution by the death of said John G. Whitney and the property sold or disposed of by this defendant either as surviving partner or otherwise, and the money collected and received and paid out by this defendant on account thereof, and the balance, if any, still remaining undisposed of."

Second. "That the plaintiff may be adjudged to pay to the defendant the residue which shall appear to be due to the said defendant after the payment of all the debts of the said firm."

Third. "That the real estate described in the complaint as situate in Washington county, Idaho, be declared to be the property of said partnership, and that defendant hold the title thereof in trust, and that he may be required to make the conveyance of the title to the undivided one-half thereof to the said plaintiff and account for the rents thereof."

On the twenty-first day of May, 1902, we find an order termed; "Decree Directing Accounting and Appointing Referee," by which it is shown that an order was made by agreement in open court, and that J. T. Pence was appointed such referee by agreement of counsel, the important part of which is as follows:

"It is therefore ordered, adjudged and decreed that an account be taken of all the partnership dealings and transactions between the decedent, John G. Whitney and W. G. Whitney, from the date of their last settled account to the time of the dissolution of said partnership by the death of said John G. Whitney, and of the moneys received and paid by said

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partners respectively in regard thereto and between one another, and that an account be taken of all dealings and transactions with regard to the property, assets and effects of said firm since the dissolution by the death of said John G. Whitney, and the property sold or disposed of by this defendant either as surviving partner or otherwise, and the moneys collected, received and paid out by this defendant on account thereof, and the balance, if any, still remaining undisposed of. And it is further ordered, adjudged and decreed that J. T. Pence, Esq., of Boise, Idaho, be appointed and he hereby is appointed referee in this action for taking such account, with full power to require the parties hereto to appear before him. the said J. T. Pence, Esq., at such time or times and place or places as said referee may require and give testimony and produce documentary evidence concerning any and all matters involved in this action and the taking of such account, and the said referee may direct the taking of depositions, hear the testimony of witnesses and examine such books, papers and accounts, and require such statements from plaintiff and defendant as in his judgment is necessary to completely determine what amount, if any, is due from either of said parties to the other of them, and report his findings to this court not later than the 10th day of October, 1902. And it is further ordered and decreed that the defendant, W. G. Whitney, make and file with the said referee, not later than the 1st day of July, 1902, a debit and credit statement of the accounts between himself and the decedent, John G. Whitney, and plaintiff herein and his predecessors as administrators of the estate of said John G. Whitney, deceased."

It will be observed that this order of reference empowers the referee with complete authority to hear and determine all the disputed facts between the parties, and to determine what amount, if any, is due from either of said parties to the other. and report his findings to the court not later than a day fixed in the order.

That the referee reached a conclusion and notified counsel of such fact is shown by the record, but the date is not shown.

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Twenty-five objections to the findings were filed by counsel for defendant, and on the twenty-sixth day of February, 1904, the court made and caused to be entered an order as follows: "It is ordered by the judge of this court that the said referee further report to the court a finding of fact upon each of the issues presented by the pleadings; that is to say, all matters set up in the complaint which are denied by the answer and thus put in issue; and in reporting the amount due from the defendant to the plaintiff, that the referee classify the account into its different parts as near as he may be able to do so from the evidence in the case before him, and report the balance in favor of either party upon each of such classifications; that is to say, the amount realized, if any is proved, from the continuance of the copartnership business subsequent to the death of the decedent, the real estate owned by the estate of the decedent and the defendant at the time of the commencement of this suit, if there was evidence before him from which this may be found; and also the amount of personal property so owned, including notes and accounts; also the amount of salary awarded to the defendant in the total amount found by the referee and for what period of time; whether the decedent, on or about the fourth of January, 1900, received \$1,000 from the First National Bank of Idaho; the amount of money paid out by defendant on account of the Coopville property, and whether or not, in the final result obtained by the referee, such amount was included; also a statement of all items which were claimed by the defendant at the hearing and which were disallowed by the referee; also a report what disposition was made of the real estate and personal property belonging to the estate that came into the hands of the defendant after the death of the decedent. The purpose of this order is to enable the court to make findings covering all the issues in the cause, and make them in such a way as to enable either party to intelligently attack the findings if they should so desire on a motion for a new trial based on insufficiency of the evidence to support them. And the court directs this report to be made on or before the first day of

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May of the present year and filed with the clerk of this court at Mountain Home, Idaho."

Complying with this order of the court, on the thirtieth day of April, 1904, the referee filed his report, which was afterward adopted by the court as the findings in the case and judgment was entered accordingly. The findings are as follows:

"Referee finds: 1. That on the fourth day of January, 1891, John G. Whitney died intestate at Payette, Idaho, and that thereafter, on or about October 7, 1901, plaintiff was duly appointed administrator of said decedent's estate; that he duly qualified and entered upon the discharge of his said duties, and that he has continued in the discharge thereof to the present time, and that said letters of administration have not been revoked.

"2d. That at the time of the death of said John G. Whitney, and for a long time prior thereto, said John G. Whitney and W. G. Whitney, defendant, were general partners in the nursery business at Payette, Idaho.

"3d. That upon and at the time of the death of said John G. Whitney, W. G. Whitney, defendant, took possession and control of all the property of the copartnership as surviving partner, and has continued to so act up to the present; that prior to this no final accounting of the estate matters has been made by defendant.

"4th. That at the time of the death of John G. Whitney, said decedent and the defendant herein were the joint owners of the following described real property: The east half of the southeast quarter of the southeast quarter and west half of southeast quarter of southwest quarter, section 27; also that portion of land lying east of the O. S. L. Railroad track, bounded by a line running parallel to and 100 feet from the center of the railroad bed, situated in the southwest quarter of the southwest quarter of southwest quarter, section 27; also the north half of the southwest quarter, section 27, in the then Ada county, Payette, Idaho; also the following described land, commencing at a point 250 feet east of the northwest

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corner of Shannon's addition of Weiser City, Washington county, Idaho, thence east 200 feet, thence north 435 feet 6 inches, thence west 200 feet, thence south 435 feet six inches, to place of beginning, in all two acres, in Weiser, Washington county, Idaho; also sixteen lots in the town of Asotin, State of Washington.

"5th. That the Payette realty described in the preceding paragraph was distributed by order and decree of the district court of the third judicial district of the state of Idaho, entered of record April 30, 1892.

"6th. That the Weiser, Idaho, and Asotin, Washington, properties were held by defendant as surviving partner at the time of the institution of this action; that there was no other partnership property in real estate.

"7th. That said Weiser and Asotin properties at all times stood on the records of the respective counties in the name of the defendant, but that they were in reality a joint property of the decedent and defendant.

"8th. That since the commencement of this suit defendant has sold the said Weiser and Asotin properties and has accounted for the proceeds of sale thereof, and has given the estate of decedent credit for one-half the proceeds and said credit is taken into consideration in this report.

"9th. That at the time of the death of said John G. Whitney, defendant was indebted to said decedent in the sum of \$2,126.62.

"10th. That defendant has accounted to the estate for all realty, personal property, notes and accounts.

"11th. That no final settlement of the account of the partnership business had been made prior to this action.

"12th. That the partnership between defendant and decedent was a general partnership, and that each partner was entitled to an undivided one-half interest in the proceeds.

"13th. That on or about May 25, 1889, decedent and defendant had a full and complete settlement and accounting with respect to said partnership business.

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“14th. There was no personal property nor credits of any value in the hands of the defendant at the commencement of this action.

“15th. That defendant is entitled to a salary of \$600 per year for the years 1891 and 1892, after which partnership sales were not made, a total amount of \$1,200 for managing partnership business as surviving partner.

“16th. That on or about the twenty-fifth day of December, 1899, a note was given by decedent and defendant to the First National Bank of Idaho, and that defendant paid the said note on May 1, 1890, and credit is given him therefor.

“17th. The amount of money paid out on the Coopville property amounts to \$467.84. This is taken in consideration in the account, but not allowed defendant in his claim against the estate, as the Coopville property was not the property of said estate.

“18th. The disposition and control of all the partnership property was in the hands of the defendant from the time of death of John G. Whitney. The disposition of real estate has been heretofore referred to. The nursery stock was purchased from the administrator by defendant for the sum of \$1,000 in 1894; there was an amicable adjustment and agreement of the rest of the personal property, and this was divided between the estate and defendant. The notes and credits were considered of little or no value by the defendant and administrator, and were turned over to the defendant, and no charge made against him therefor, and the referee finds the notes and accounts of no value.

“19th. The amount realized by the estate from the continuance of the partnership business subsequent to the death of decedent is \$8,103.83, plus the \$2,126.62 due the estate after death of John G. Whitney, equals \$10,230.45, and is contained in the result of thousands of items, counter debits and credits and as shown in the books of accounts introduced at the trial thereof. The final result of said accounting, be-

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ing against defendant and in favor of plaintiff, in the sum of \$416.11, with interest thereon from May 19, 1900.

“J. T. PENCE, Referee.”

Appellant has assigned many errors of both law and fact, but a review of them discloses that they are nearly all based on the theory that the evidence was insufficient to support the findings and conclusions reached and reported by the referee, and that the referee neglected to comply with the order of the court in making his report, in that he does not find on all the issues presented by the pleadings as directed by the court.

From the entire record before us for review we are led to the irresistible conclusion that the all-important question to be determined by the referee was the financial relations existing between defendant and the heirs of his deceased brother, and for many years his business partner. By the complaint and answer we are informed that there was a difference of about \$11,000 growing out of the former and subsequent relations existing between the two brothers. The plaintiff, as the representative of the deceased Whitney, alleging that a final accounting would show an indebtedness of \$5,000 or more due the estate, and the defendant averring that such an accounting would show the estate indebted to him in the sum of \$6,000 or more, and both praying for such accounting. The court appointed Mr. J. T. Pence, an able and in every way reputable attorney of this court, with full power to hear testimony on all the issues found by the pleadings, and within a specified time to report his findings and conclusions to the court.

Counsel for appellant earnestly insist that the report of the referee is not complete and does not meet the requirements of the order of the court, particularly in that it does not classify the items of debit and credit. We find that the referee filed a report which was objected to by counsel for appellant, and the court made an order requiring the referee to make the report more definite as to certain issues presented by the pleadings.

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We find the following reasons assigned by the learned trial judge who made the order: "The purpose of this order is to enable the court to make findings covering all of the issues in the cause, and make them in such a way as to enable either party to intelligently attack the findings if they should so desire on a motion for a new trial, based on insufficiency of the evidence to support them." This order was made and filed February 26, 1904. On the thirtieth day of April, 1904, the referee filed his findings, termed "Supplemental report." Again, there was an objection to the sufficiency of these findings interposed by counsel for appellant which was filed May 3, 1904. On the twenty-fourth day of May, 1905, the court adopted the findings of the referee and ordered judgment according to the report of the referee. The nineteenth finding of the referee is as follows: "The amount realized by the estate from the continuance of the partnership business subsequent to the death of decedent is \$8,103.83, plus the \$2,126.62 due the estate after death of John G. Whitney, equals \$10,230.45, and is contained in the result of thousands of items, counter debits and credits and as shown in the books of account introduced at the trial hereof. The final result of said accounting being against defendant and in favor of plaintiff, in the sum of \$416.11, with interest thereon from May 19, 1900."

This conclusion was reached by the referee after hearing all the evidence offered by the parties to the litigation and an opportunity to examine all the exhibits introduced by appellant, which consisted of the books of the copartnership, stubs of the partnership check-books, together with an itemized statement prepared by appellant for the use and benefit of the referee purporting to show all the business transactions from the time of the settlement between appellant and his deceased brother, which was found by the referee to have been "on or about May 25, 1889."

It is insisted by appellant's counsel that many errors are shown to exist in the books of the company, which, if corrected, would leave a large balance due appellant from the estate

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of his deceased brother. It is apparent that the referee took into consideration all these questions in arriving at his final balance.

The tenth finding of the referee is: "That defendant has accounted to the estate for all realty, personal property, notes and accounts," thus exonerating him from all intentional wrong. It is not difficult to see that the entire trouble has arisen over carelessness in the manner of keeping the books and accounts of the partnership, and we cannot see how any good would follow another long expensive trial.

The fifteenth finding of the referee is: "That defendant is entitled to a salary of \$600 per year for the years 1891 and 1892, after which partnership sales were not made, a total amount of \$1,200 for managing partnership business as surviving partner."

Plaintiff appeals from the judgment and assigns as error the allowance of the \$1,200 as salary to defendant. Our attention is called to section 5554, Revised Statutes, which is as follows: "The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balance as may from time to time be payable to him, in right of the decedent."

It is true, as urged by counsel for respondent, that the general rule is that the "surviving partner is entitled to no salary as surviving partner" for managing partnership business. In support of this contention our attention is called to *Loomis v. Armstrong*, 49 Mich. 521, 14 N. W. 605; *Stow v. Case*, 59 Iowa, 503, 13 N. W. 645; *In re Brown's Appeal*, 89 Pa. St. 159.

In American and English Encyclopedia of Law, volume 22, pages 220-226, the rule is stated as follows: "The surviving partner is not entitled to compensation for collecting the assets and winding up the firm business, as a general rule, in the absence of express agreement to that effect. There are, however, exceptions to this rule in modern adjudications. When a partnership has been carried on for some time after dissolution by death and such continuance has proved to be beneficial, it has been held that the surviving partner should

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be allowed to take compensation for his services to be deducted from the profits before they are divided." A number of authorities are cited in support of this text. (*Maynard v. Richards*, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138.)

On the subject of salary above referred to the referee in his preliminary report says: "The salary for the years 1891-1892, as they seem to be reasonably fruitful years for both the surviving partner and the estate, the salary of \$600 is allowed for 1891, and \$600 for 1892, as that was a reasonable time within which to close up the partnership affairs, and for the further reason that during the succeeding years there was practically nothing coming to the estate, salary for the years 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900 and 1901, as claimed by the defendant, is not allowed." Owing to the complicated condition of the books and accounts of the copartnership business as shown by the testimony of appellant and the report of the referee, and the further fact that the appellant is largely responsible for such complication, he having full charge and management of the affairs and property of the partnership, we do not think equity demands another trial.

It is urged by learned counsel for appellant that it is shown by the report of the referee that at the time this suit was commenced the estate was indebted to appellant, and for this reason respondent should be required to pay the costs. On the other hand, it is claimed by learned counsel for respondent that the action so commenced was based on the reports of appellant to the probate court and administrator of the estate, by which it was apparent that appellant was largely indebted to the estate.

We are of the opinion that the judgment should be affirmed, and it is so ordered, with costs awarded to plaintiff and appellant McElroy.

Ailshie, J., and Sullivan, J., concur.

(January 19, 1907.)

ON REHEARING.

[88 Pac. 354.]

DUTIES OF REFEREE—STATEMENT OF ACCOUNT.

1. In an action for accounting in the settlement of a partnership business, where the court appoints a referee and authorizes and directs him to take an accounting of the business and transactions of the partnership, the parties are entitled to a statement from the referee of all the items of account between them, and to have the same reported to the court showing the items allowed and rejected in favor of and against each party.

(Syllabus by the court.)

Both plaintiff and defendant appeal from a judgment adopting report and findings of referee in an action for accounting. *Reversed.*

Richards & Haga, for Appellant Whitney, submit the following citations in addition to authorities cited on former hearing:

“The master or referee should report the account at length, and all the facts found by him, so that the report may be intelligible without reference to the testimony. . . . The report should contain a statement of all the items of the account between the parties, . . . and the items should be so presented that exceptions may be taken thereto. And an aggregation of items in accordance with the referee’s conclusions is insufficient. . . . Items allowed and disallowed should be stated.” (Citing authorities; 15 Ency. of Pl. & Pr. 959.)

The correct way in deciding upon such account would be for the report to show what items were allowed and what disallowed. Then either party could except to the particular items objected to. And the sufficiency of the exceptions could be determined on a review, without examining the whole. (*Reed v. Jones*, 15 Wis. 40.)

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The appellant Whitney excepted to the report for the reason that he was unable to tell what items entered into these aggregate amounts, and therefore he could not intelligently except to the allowance or disallowance of any special item. This exception should have been sustained, and the report re-committed, with direction to the commissioner to make an itemized statement showing item by item the credits, debits and all sums disallowed. (*Dewing v. Hutton*, 40 W. Va. 521-539, 21 S. E. 780.)

Hugh E. McElroy and Frank Martin, for Appellant McElroy.

AILSHIE, C. J.—A rehearing was granted in this case and it was again argued at the present term. The question dwelt upon and most strongly argued on the rehearing is, “the entire failure on the part of the referee and the court to furnish a statement of the items allowed and disallowed.” As may be observed from an examination of the former opinion in this case, the referee did not report a statement of account between the parties—he did not report the debits and credits or the items allowed and disallowed in favor of and against each party. The powers and duties of the referee in this case are measured by the order of reference and the essential purpose of that order and the object of the appointment appears to have been “for taking such account”; namely, an accounting between the parties. The question did not arise in this case as to the power of the referee to make findings of fact and conclusions of law, but the action of the trial court seems to indicate that such power was not conceded. Counsel for appellant claim that the court took the view announced in *Bradshaw v. Morris*, 20 Mont. 214, 50 Pac. 554, and *Murphy v. Patterson*, 24 Mont. 575, 63 Pac. 375, as to the power and authority of the referee under the order of reference. As we view this case, however, after a further examination thereof it occurs to us that the vital question is as to whether the referee has discharged the duties for which he was appointed

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and whether the court should have accepted or rejected his report. In 24 American and English Encyclopedia of Law, second edition, 234, the author in considering the rights of the parties in such case says: "The parties are entitled to a statement from the referee of all the items of account between them, in order that either may, if he thinks proper, except to any particular item." To the same effect is 17 Encyclopedia of Pleading and Practice, 1037, and 15 Encyclopedia of Form and Procedure, 956.

The respondent contends that since the dealings and transactions of the parties cover several thousand items, it would be an endless task to report each item and the action of the referee thereon. The contention is not sound, for the reason that the referee has of necessity had to arrive at the conclusion as to the amount due from some data or computation of accounts. As said by the supreme court of Washington in *Park v. Mighell*, 3 Wash. 737, 29 Pac. 556: "He must have had some data from which to arrive at that sum, and he should have given the court the benefit of that by stating clearly what items he allowed for and against each party. In other words, he should state the account between them. It is only by so doing that the court can intelligently review his action and decide whether to confirm or reject it." (*Hurdle v. Leath*, 63 N. C. 366; *McC Campbell v. McClung*, 75 N. C. 393; *Reed v. Jones*, 15 Wis. 40; *Gage v. Arndt*, 121 Ill. 491, 13 N. E. 138.)

In this case the order required that the defendant W. G. Whitney, who was the surviving partner, and as such in charge of the books, accounts and vouchers pertaining to the business for which the accounting was to be had, should "make and file with the said referee, not later than the first day of July, 1902, a debit and credit statement of the accounts between himself and the decedent, John G. Whitney, and plaintiff herein and his predecessors as administrators of the estate of said John G. Whitney, deceased." The statement of account was made and filed by the defendant, and we see no good or valid reason why the referee could not have re-

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ported to the court the account as taken by him, and what should be allowed and what rejected. If it is true that the parties or either of them had not the right to insist on that being done, their right to object and except to the report or any part thereof, and have it reviewed by the district court or on appeal, is an idle thing of no virtue or protecting force, and a delusive snare to the unwary. For the failure of the referee to make a statement of account as directed by the order and to report the same to the court, we are convinced that the judgment should be reversed. Judgment is reversed and cause remanded, with directions to the trial court to take further action in accordance with the views herein expressed. Under the circumstances of this case and in view of the whole record we have concluded to require each party to pay one-half of all costs incurred on this appeal.

Sullivan, J., concurs.

Stewart, J., took no part in the decision.

(July 6, 1906.)

JOHN CROWLEY, Respondent, v. CROESUS GOLD AND
COPPER MINING COMPANY, Appellant.

[86 Pac. 536.]

MOTION TO STRIKE FROM RECORD—INSTRUCTIONS—AFFIDAVITS—MOTION
TO SUPPLY RECORD WITH CERTIFICATE OF CLERK—OBJECTION TO COM-
PLAINT THAT IT DOES NOT STATE CAUSE OF ACTION.

1. The instructions given on the trial can only be reviewed in this court when they are saved by bill of exceptions, they being no part of the judgment-roll.

2. Affidavits purporting to show errors committed in impaneling the jury are no part of the judgment-roll, and can only be reviewed when saved by bill of exceptions.

3. The certificate of the clerk of the district court that certain affidavits were used on the application for a new trial, and that they were all the affidavits used, is not sufficient to authorize this court to consider such affidavits. Such certificate must be made by the trial judge or in an authenticated record certified by the

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judge showing what papers were used on such application for new trial.

4. A certificate by the trial judge that "I have this day settled the within statement in the manner marked by me in pencil, allowing the proposed amendments where so marked and disallowing them where so marked," is not sufficient to authorize this court to consider the statement on appeal, as it is not known that such certificate was made after the statement was engrossed.

5. An objection that the complaint does not state a cause of action first made in this court will not warrant the court in granting a new trial where it is shown that the complaint, even though inartistically drawn, states that the injury complained of resulted from the careless and negligent construction and operation of appellant's machinery and appliances used in appellant's mine, and further calls attention to the particular portion of such appliances that were defective.

(Syllabus by the court.)

APPEAL from the District Court of the Fourth Judicial District for Blaine County. Hon. Lyttleton Price, Judge.

Respondent commenced his action for damages for personal injuries sustained while at work in appellant's mine. Judgment for plaintiff, from which and an order overruling a motion for a new trial, the appeal is taken. *Affirmed*.

McFadden & Broadhead, for Appellant.

A complaint in which a cause of action is stated for the recovery of damages for personal injuries should contain and state with precision an allegation or statement of the facts and circumstances from which it is shown that the defendant owed a legal duty to the plaintiff. An allegation of a duty standing alone is insufficient. (*Chicago etc. R. Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680; *Gibson v. Leonard*, 37 Ill. App. 244, 349; *Angus v. Lee*, 40 Ill. App. 304.)

The pleader must state facts from which the law will raise a duty and show an omission of duty and resulting injury. (*Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161.)

A declaration for wrongfully and negligently injuring or killing another, without stating the facts constituting the neg-

Argument for Respondent.

ligence, ought to be held insufficient. (*Cotton Oil Co. v. Shamblin*, 101 Tenn. 263, 47 S. W. 496; *Chicago etc. R. Co. v. Harwood*, 90 Ill. 425.)

S. B. Kingsbury and A. A. Fraser, for Respondent.

The affidavits in the transcript, not being a part of the judgment-roll, nor incorporated into any bill of exceptions, should be stricken from said transcript. (*State v. Larkins*, 5 Idaho, 200, 47 Pac. 945; *Rich v. French*, 3 Idaho, 727, 35 Pac. 173; *Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189; *Fish v. Benson*, 71 Cal. 431, 12 Pac. 454.)

On appeal from order heard upon affidavits the only proper mode of authenticating such affidavits on appeal to this court is by bill of exceptions. (*Somers v. Somers*, 81 Cal. 608, 22 Pac. 967.)

The instructions set out in the transcript should be stricken out, as they are not embodied in a bill of exceptions and are not part of the judgment-roll. (Rev. Stats. 1887, sec. 4456.)

The purported bill of exceptions in this case, or statement on motion for a new trial, should be stricken from said transcript, as said statement is not properly authenticated by the trial judge, and the record shows that said statement or bill of exceptions was not authenticated by the judge after being engrossed, as required by law and the practice of this court. It is the duty of the appellant to furnish the supreme court a complete, clean, properly arranged and properly authenticated transcript. (*Kimble v. Semple*, 31 Cal. 657; *Thompson v. Patterson*, 54 Cal. 547; *Cosgrove v. Johnson*, 30 Cal. 509.)

The proper practice is to engross a statement and have the authentication of the judge indorsed on engrossed statement. (*Pence v. Lemp*, 4 Idaho, 526, 43 Pac. 75; *Hattabaugh v. Volmer*, 5 Idaho, 23, 46 Pac. 831.)

The statement on motion for a new trial and amendments, as allowed by the court, must be engrossed into one, and authenticated by signature of the judge in order to be regarded as the statement required by law and to be considered on

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appeal. (*Smith v. Davis*, 55 Cal. 26; *Sawyer v. Sargent*, 65 Cal. 260, 3 Pac. 872.)

Clerk's certificate that statement is the same which was used on motion for a new trial is entitled to no weight, as the clerk is not authorized to verify a statement in that form. (*Fee v. Starr*, 13 Cal. 170; *People v. Bartlett*, 40 Cal. 142.)

STOCKSLAGER, C. J.—This appeal is from the district court of Blaine county. Respondent as plaintiff commenced his action in that court, alleging that he had been damaged in the sum of \$5,000, by reason of certain injuries sustained by him while working in the mine of defendant—appellant.

The first allegation is that defendant is a corporation organized and existing under and by virtue of the laws of the state of Wyoming, and is engaged in the business of mining in Blaine county, Idaho.

The second allegation is that defendant is the owner and operator of that certain mining property called the "Croesus Mine."

Allegations numbered 3, 4 and 5 are as follows:

"III. That plaintiff was, on the thirtieth day of June, 1904, an employee of defendant, was then set to work mining in said mine, and was by the defendant set and placed at work at the bottom of a deep shaft, about eleven hundred feet below the surface of the earth and collar of said shaft, and as such miner and employee was, on said thirtieth day of June, 1904, employed, set to work and placed by defendant at bottom of such said shaft, where the work and duty of plaintiff as such employee, and he was so directed by defendant, was to help to fill the hoisting bucket used and then being used to hoist the rock, dirt, ore and materials from the said bottom of said shaft up through the shaft to the top of the shaft and surface of the earth, and plaintiff was then and there so employed by and working for defendant, and under its direction, control and order. That it was then and there the work and duty of defendant, and a duty it owed this plaintiff so employed in carrying on such mining and in remov-

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ing rock, earth, material and ore from said mine, to use, provide, maintain and employ, safe, suitable and proper machinery, plans, appliances, apparatus and materials for and in so doing and to employ competent, careful and skilled engineers, superintendents and foremen to make, set up, operate, install and keep in order said mine, shaft, machinery and all appliances and apparatus used and to be used for the purpose of removing rock, dirt, material and ore from said mine, and of lifting and elevating them in said shaft from lower to higher levels and especially in lifting large quantities of heavy material from great depths to the surface of the earth when its employees and this plaintiff were at work beneath the hoisting bucket, and appliances containing said materials and connected with the same; and when the hoisting bucket was loaded or filled with earth, rock, ore or other heavy materials, and was to be lifted or hoisted over and above plaintiff and other persons at work in bottom of said shaft, and was being so hoisted, it was the duty of defendant to use, employ, provide and allow used suitable, and only suitable, and safe plans, means, machinery, apparatus and appliances for such conditions and work and lifting, and to keep and maintain all in such suitable, safe and proper working condition, working properly and safely and working and operating in such manner as not to be likely to upset, or to fall, or to spill out the contents of said hoisting bucket when the same was above plaintiff and those working at bottom of said shaft, and to attend to and see to and effect that the earth, rock and dirt could be and was so being removed, raised and handled and by such appliances that it would not be apt to spill out or fall, and would not spill or fall and thus endanger the life and limb of plaintiff or of any person so working below.

“IV. That on said thirtieth day of June, 1904, plaintiff had been employed in said mine but five days and knew little of the conditions, state, safety or operation of said mine, or in said mine, or concerning the machinery, appliances or apparatus used and employed in said mine or in said shaft, and had little knowledge of the hoisting works therein or of the

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operation of the hoist or of the acting and operating of the hoisting bucket; and plaintiff is not an engineer, is not a mechanic, is not a millman, and is not skilled in or concerning such or any machinery, or the operation thereof, and has had no experience in making, placing, using or operating the same, and then and there had no use of, control over, work with or in connection with any of the machinery of said mine, or in or about said shaft, or concerning said hoist, or any of the apparatus for hoisting in said shaft, and had nothing to do, and never had had anything to do, with the operation of said hoist or of any of the machinery in, of or about said or any mine. But plaintiff did then and there and at all times rely upon his reasonable expectation and belief, which belief he then had that defendant would use, install, employ and operate only safe, suitable, proper and properly operating machinery, apparatus and hoist, and not be negligent thereabout so as to render life and limb of himself and others so then employed reasonably safe. That plaintiff did not knowingly assume or undertake any place, work or occupation of extra hazard to life or limb and did not assume knowingly any risk or hazard at all, of, or concerning the hoisting apparatus not being safe or not operating properly and safely or the upsetting for any cause or reason of the hoisting bucket while in shaft high above him, and that no such risk was known of or to plaintiff or presented to mind of plaintiff or assumed by him. Plaintiff was so employed by the defendant to use pick and shovel, and as a miner in the earth simply and not to do with, use, have control of or connection with any of the plans, machinery, apparatus or operation of any such in any way; and plaintiff was then and there digging and shoveling earth, rock and dirt at bottom of said shaft, which was of the nature of his employment by the defendant. And at said time, on said thirtieth day of June, 1904, the time of the occurrence of the accident and injury herein complained of, the plaintiff was in the prudent and careful discharge of the duties of his said employment, and wholly without fault or blame at such work at bottom of said shaft. And plaintiff was then and there ignorant of any defect or

of any incompetence, or of any want in any machinery or in operation of the same in said shaft, and had no fear of, and knew of no cause for fear of, any accident due to the upsetting of hoist bucket or of the falling of the same, or its contents, due to any defect.

“V. Yet the defendant corporation, not regarding their said duty on the said thirtieth day of June, 1904, at said mine in Blaine county, carelessly and negligently suffered and allowed the hoisting apparatus, the hoisting bucket and the means of controlling and guiding and lifting the same in and up said shaft in said mine to be and to remain unsafe, defective and insufficient, operating badly, unfit for use, and dangerous to those working below said bucket at bottom of said shaft, the cross-bar or cross-head and apparatus for guiding said bucket when being hoisted not working properly and not properly constructed and adjusted and adapted, but was so and such that it might and was apt to hang up and not follow the bucket so as to be in place to guide and control it, and the hoisting bucket was so hung, moved, lifted and used, and not properly guided and governed so that it might, could and was apt to catch, tip, upset and spill out its contents and endanger the life and limb of the persons below. All of which was known to the defendant but unknown to plaintiff, and of which the defendant had had notice and of which plaintiff had had no notice, and said such defects were dangerous to any person working below said hoisting bucket, however much care said workman might use. That the said defects in said hoist and in its operation were of such kind, nature and character, and had hitherto so worked and operated and failed to act properly that defendant, through its officers, agents, foremen and machine operators, must have known of the same, and have known that it was unsafe to work below in said shaft while said hoisting bucket was being lifted, or might have known of such defects and of said danger by the exercise of reasonable care and diligence. By reason of which neglect of duty by the defendant corporation, and the unsafe condition of said hoist, and the insufficient and not properly adjusted, fitted and operating cross-

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bar or cross-head for guiding said bucket and by reason of the insufficient, unsafe, not properly working and operating hoist and hoist bucket in said shaft and mine, and by reason of the hoisting bucket not being properly guided and controlled it caught, upset and fell and emptied out its contents on said day down and upon the plaintiff while so at work at bottom of said shaft, where set to work by defendant, and by said bucket upsetting and tipping over, large quantities of earth and rock were let fall down said shaft from a great height above head of plaintiff, and then and there, while plaintiff was without fault and was exercising due care and caution, he was hit and struck by large pieces of rock and earth falling from said bucket down said shaft and his body was jammed, crushed, broken, bruised and wounded; his bones broken and he permanently injured; ribs broken and ribs fractured, the ilium mashed and broken; hip-bone broken, bruised and mashed and the muscles of plaintiff's hip, side and back bruised, injured and permanently impaired; his side and hip wounded, bruised and disabled; and he thereby became and was sick, sore, lame and disordered and has so continued for a long space of time, and from thence hitherto and still so continues, during all of which time plaintiff has suffered great pain of body and mind, and has been wholly prevented from doing any work or labor or business whatever, and is permanently lamed and disabled by reason of such said injury to plaintiff, damage in the sum of five thousand dollars."

Defendant answered, putting in issue all the material allegations of the complaint, and further answering, in substance, averred that all the appliances used in and about the operation of said mine were at the time of the accident complained of, and for a long time prior thereto, such as are and were in general use in the carrying on of mining operations throughout the state of Idaho. That in selecting all the machinery and appliances at said mine, and especially the said cross-bar in the cross-head, it used extra care and caution, and during all of the time the same was used made daily inspections of all parts of said machinery for the purpose of de-

tecting any defects there might be in said machinery, and in order to keep the same in repair. That it used every possible means to avoid and prevent accidents. It is then alleged that the plaintiff was himself guilty of negligence in standing directly beneath the bucket and hoist while the same was being hoisted to the surface, and that but for the said negligence of the plaintiff he would not have been injured.

Upon these issues the case was tried, the jury returning a verdict in favor of the plaintiff in the sum of \$3,000. The appeal is from the judgment and an order overruling a motion for a new trial.

Counsel for respondent moved to strike out all that portion of the transcript containing the instructions given and refused by the court, for the reason that said instructions are no part of the judgment-roll, and are not embodied in any bill of exceptions. Respondent's counsel also moved to strike from the transcript the affidavits of Jesse B. Root and M. D. Barstow, for the reason that such affidavits form no part of the judgment-roll and are not embodied in any bill of exceptions.

Counsel further moved to "strike out from said transcript all that part of said transcript commencing on page 66 and ending at the bottom of page 200; said portion of said transcript purporting to be the statement used on motion for a new trial herein and bill of exceptions, for the reason that said purported statement or bill of exceptions was not signed, settled and allowed by the trial judge after being engrossed; and it is impossible to determine whether or not the amendments to said statement are incorporated therein as allowed by said court, and whether or not the amendments which were disallowed have been omitted from said transcript. And for the further reason that there is no proper certificate of the said trial judge showing that any statement on motion for a new trial or bill of exceptions was ever settled and allowed by said trial judge as required by law and the rules of this court."

This motion was sustained for the reason that the affidavits of Jesse B. Root and M. D. Barstow have no place in the judg

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ment-roll, neither do the instructions constitute any part of the judgment-roll under the provisions of section 4456, subdivision 2, Revised Statutes of 1887.

If appellant desired to have the alleged errors set out in the affidavits above referred to, and the instructions given, refused or modified, reviewed by this court, it could have been done by bill of exceptions settled by the trial court, and filed with the clerk, when it would have become a part of the judgment-roll. This question has been frequently passed upon by this court. (See *Rich v. French*, 3 Idaho, 727, 35 Pac. 173; *State v. Larkin*, 5 Idaho, 200, 47 Pac. 945; *Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189; *Williams v. Boise Basin Mining & Development Co.*, 11 Idaho, 233, 81 Pac. 646.) The statement on motion for a new trial or bill of exceptions—no matter which it is termed—must be stricken from the transcript as it is not properly authenticated by the trial judge, as shown by the record, after it was engrossed. The only authentication we find in the record is as follows: "I have this day settled the within statement in the manner marked by me in pencil, allowing the proposed amendments where so marked, and disallowing them where so marked. Lyttleton Price, Judge. Oct. 11, 1905."

It is evident this certificate was made before the transcript was engrossed, and we would be at a loss to know what proposed amendments were allowed and what not allowed.

In *Hattabaugh v. Vollmer*, 5 Idaho, 23, 46 Pac. 831, this court said: "When amendments are offered and allowed to a proposed statement on motion for a new trial, the statement as amended must be engrossed before this court will consider such statement." The statement on motion for a new trial and amendments as allowed by the court must be engrossed into one and authenticated by the judge in order to be regarded as the statement required by law and to be considered on appeal. This motion must be sustained.

On the twentieth day of June, 1906, after respondent's counsel had argued and submitted his motions to strike from the transcript the affidavits of Jesse B. Root and M. D. Barstow, and all of the transcript excepting that part that con-

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stitutes the statutory judgment-roll, counsel for appellant filed his motion "for leave to have the clerk of the district court of Blaine county, Idaho, from which said district court this appeal is prosecuted, amend his certificate to the transcript on appeal herein, so that it will show that the affidavits of Jesse B. Root and M. D. Barstow . . . were the only affidavits used in the said district court upon the hearing of the appellant's motion for a new trial." This motion was overruled for the reason that such certificate from the clerk would not be sufficient. A certificate from the judge would fill the requirements of the statute. This leaves the case for review on the judgment-roll alone.

In his oral argument in this court learned counsel for appellant insisted that the amended complaint failed to state a cause of action. He says paragraph 3 of the complaint only states conclusions of law and the duty of the master, and that paragraph 4, "wherein it is set forth that the servant was unskilled in the work in which he was engaged; that he had been at work but a few days and knew nothing of the work he was employed to perform, and that he did not assume any risk. . . . The law determines whether a servant does or does not assume a risk in entering the service of another."

On the other hand, we have the learned gentlemen who represents the respondent in this court insisting that were paragraphs 3 and 4 eliminated from the complaint or treated as surplusage, still paragraph 5 sufficiently states a cause of action of the character attempted to be set out by the complaint to inform the appellant just what it was to meet in the court below. That the negligence and carelessness of appellant in the construction and handling of their machinery and apparatus in and about the said Croesus mine, and especially the appliances for the use and operation of the bucket in use in the perpendicular shaft were defective and dangerous by reason of their faulty construction and operation.

Again, it is urged that appellant cannot be heard to object to the sufficiency of the complaint in this court, having waived such defect, if any, by failure to demur in the court below. Notwithstanding section 4178, Revised Statutes, there

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is much force and reason in this contention. Section 4178 provides: "If no objection be taken either by demurrer or answer the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action." If this section is to be literally construed and followed, it practically does away with the necessity of a demurrer in the lower court on the ground that the complaint "does not state facts sufficient to constitute a cause of action." By the terms of this section the defendant may go to trial on a complaint that does not state a cause of action, and, after a tedious and expensive hearing, appeal, and for the first time raise the question of the sufficiency of the complaint in this court. This is not justice, and the legislature should repeal or modify this section to the extent that a failure to demur in the court below waives the right to be heard to object in the appellate court. All questions affecting the pleadings should be settled in the trial court and thus avoid unnecessary delay as well as expense. Many of the "delays of the law" frequently commented on by newspapers and taxpayers are directly traceable to such dilatory statutes as the provision under consideration, and the courts are powerless to furnish relief, the remedy being with the legislature.

The complaint in the case under consideration states many things that could have been left out; and, taking it in its entirety, it is possible that a motion to make it more definite and certain or a special demurrer would have been sustained in the court below; but appellant having failed to either demur or move to make the complaint more definite and certain, and having answered, it only becomes necessary for us to determine whether there is a sufficient statement of the facts to support the judgment. In *Rush v. Newman*, 58 Fed. 158, 7 C. C. A. 136, we find a quotation from Mr. Justice Brewer, then of the supreme court of Kansas, in *Laithe v. McDonald*, 7 Kan. 261, as follows: "After answer filed, an objection to a petition that it does not state facts sufficient to constitute a cause of action is good only when there is a total

failure to allege some matter which is essential to the relief sought, and is not good when the allegations are simply incomplete, indefinite or statements or conclusions of law." (Citing *Moody v. Arthur*, 16 Kan. 419.)

In *Glaspie v. Keator*, 56 Fed. 203-211, 5 C. C. A. 474, Judge Thayer, speaking for the court, said: "The demurrer seems to have been based on the ground that the complaint was defective in not showing with sufficient certainty that any damage was sustained in consequence of the alleged defect. The point is untenable. The complaint averred generally, in the concluding paragraph, that damages had been sustained in a certain sum, which was all that the pleader was required to aver. But even if the complaint had been defective, as supposed, it was merely a technical defect. which was waived by pleading to the merits, and was cured by the verdict." In the opinion it is said: "If the complaint was defective in the respect claimed, it was a defect which plaintiff had a right to remedy by amendment, and such defects are cured by the verdict."

In the case of *Board of Commrs. of Hamilton Co. v. Sherwood*, 64 Fed. 103 (11 C. C. A. 507), at page 105 of the opinion, it is said: "The first point urged upon our attention is that a demurrer interposed to the petition on the ground that it did not state a cause of action should have been sustained, because there was no averment found in the petition that when the suit was commenced the county treasurer had money sufficient to pay the warrants, or that a sufficient time had elapsed for the collection of money wherewith to pay them. We need not stop to determine the merits of this contention, because the record shows that the county did not stand upon its demurrer when it was overruled, but answered the petition, and entered into a long, expensive and tedious trial, whereby it waived the point raised by the demurrer, even if it had merit." A similar question is discussed in *Encyclopedia of Pleading and Practice*, volume 14, page 334, and cases cited; *House v. Myer*, 100 Cal. 592, 35 Pac. 308; *Stephenson v. Southern Pacific Ry. Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; *Aulbach v. Dahler*, 4 Idaho, 654, 43 Pac.

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322; *Hollister v. State*, 9 Idaho, 651, 77 Pac. 339. There seems to be so much reason, justice and equity in this rule that we can see no reason why it should not be followed, especially where it is shown that the defendant did not even file a demurrer, but answered to the merits, denying that there were any defects whatever in the machinery and averred that the injury was the result of defendant's own carelessness and negligence, and thus took his chances in the court below if he was successful in the trial, but reserved his right to object to the sufficiency of the complaint in case the verdict of the jury was adverse to him. Even under our statute this practice should not be encouraged, and if this court can find in the complaint any reason for holding it sufficient it should not hesitate to do so, and rather give the respondent the benefit of the doubt than to reverse the judgment and put the parties to another long, expensive trial.

Mr. Justice Sullivan, speaking for this court, in *King v. Oregon Short Line R. R. Co.*, 6 Idaho, 306, 55 Pac. 665, 59 L. R. A. 209, says: "It is conceded by counsel for appellant that the complaint in this action would be good against a general demurrer, to wit, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, and that it is sufficient to sustain a verdict or judgment, unless attacked by a demurrer on the ground of uncertainty, specifically setting forth wherein it is uncertain." If we follow the rule laid down here, it is conclusive of the case at bar. If a complaint that states "that defendant so carelessly and negligently ran and managed its locomotives and cars" is a sufficient statement of facts to warrant a recovery, unless a special demurrer is interposed, the complaint in the case at bar is good against an objection in this court that the complaint does not state a cause of action.

Again, it is said in *King v. Oregon Short Line R. R. Co.*, *supra*, after quoting from *Stephenson v. Southern Pac. Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407: "So we think in the case at bar the complaint sufficiently states a cause of action, except as against a special demurrer on the ground of uncertainty."

Points Decided.

From a consideration of all the authorities to which our attention has been called, the prevailing rule seems to be that if the defendant fails to demur to the complaint the appellate court will not reverse a judgment on an objection that the "complaint does not state a cause of action," where it is shown by the record that the complaint does state that the injury complained of was the direct result of the negligent and careless construction and management of the property of appellant, and calls attention to the particular portion of such property that was badly constructed and managed and resulted in the injury of respondent.

We think the judgment should be affirmed, and it is so ordered. Costs awarded to respondent.

Ailshie, J., and Sullivan, J., concur.

(July 6, 1906.)

JAMES EATON, by His Guardian ad Litem, Respondent,
v. THE CITY OF WEISER, Appellant.

[86 Pac. 541.]

DAMAGES—PERSONAL INJURIES—MUNICIPAL OWNERSHIP OF ELECTRIC LIGHT SYSTEM—NEGLIGENCE IN CONDUCTING AND OPERATING THE SAME—CONTRIBUTORY NEGLIGENCE.

1. The doctrine announced in *Carson v. City of Genessee*, 9 Idaho, 244, holding cities and villages liable for negligence in the maintenance of their streets and thoroughfares in a reasonably safe condition for use by travelers in the usual modes, approved and followed.

2. Running and operating an electric light system by a municipality and the sale of electric light to private consumers is not one of its public and governmental powers and duties, but is rather a proprietary and private right and power, for the careless and negligent exercise of which the municipality will be held liable in damages the same as a private corporation or individual would be exercising like rights.

Argument for Appellant.

3. Municipal ownership, in the usual and common acceptation of that term, must of necessity carry with it the same duty, responsibility and liability on account of negligence that is imposed upon and attaches to private owners of similar enterprises.

4. Where a city is maintaining a wire across one of its public thoroughfares for the purpose of carrying and distributing a powerful and dangerous force like electricity, it must be held to the duty of exercising such diligence and care in maintaining and using the same as is commensurate with the dangers of the force which it is handling, in order that it may avoid and prevent injury to those rightfully engaged in their various pursuits and employments.

5. Evidence examined in this case and held that it does not establish such contributory negligence on the part of the plaintiff as to prevent and preclude him from recovering damages for the injuries sustained.

(Syllabus by the court.)

APPEAL from the District Court of the Seventh Judicial District for Washington County. Hon. Frank J. Smith, Judge.

Action by plaintiff through his guardian *ad litem*, against the defendant, the city of Weiser, for damages on account of personal injuries sustained by coming in contact with a live wire suspended across the street so low as to interfere with travelers along such thoroughfare. Judgment for plaintiff and defendant moved for a new trial. Defendant appealed from the judgment and from the order denying his motion. *Affirmed.*

Lot L. Feltham, for Appellant.

In the absence of a statutory provision imposing the liability, a municipal corporation is not liable for personal injuries to individuals occasioned through the neglect of officers of the corporation to properly perform their duties. (*Arkadelphia v. Windham*, 49 Ark. 139, 4 Am. St. Rep. 32, 4 S. W. 450; *Sievers v. San Francisco* (Cal.), 56 Am. St. Rep. 153, 47 Pac. 687; *Arnold v. City of Jose*, 81 Cal. 618,

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22 Pac. 877; *Goddard v. Harpswell*, 84 Me. 499, 30 Am. St. Rep. 373, 24 Atl. 958; *Hennessey v. New Bedford*, 153 Mass. 260, 26 N. E. 999; *People v. Esopus*, 74 N. Y. 310; *Rowland v. Gallatin*, 75 Mo. 134, 42 Am. Rep. 395; *Edgerly v. Concord*, 62 N. H. 8, 13 Am. St. Rep. 533; *Young v. City Council of Charleston*, 20 S. C. 116, 47 Am. Rep. 827; *Navasotio v. Pierce*, 46 Tex. 525, 26 Am. Rep. 279; *McCutcheon v. Homer*, 43 Mich. 483, 38 Am. Rep. 212, 5 N. W. 668; *Hewison v. City of New Haven*, 37 Conn. 475, 9 Am. Rep. 342; *Pray v. Mayor of Jersey City*, 32 N. J. L. 394; *Bates v. Rutland*, 62 Vt. 178, 22 Am. St. Rep. 95, 20 Atl. 278, 9 L. R. A. 363.)

At common law there is no liability upon a municipality for injuries received by defective ways. (Shearman & Redfield on Negligence, sec. 346; Cooley on Torts, p. 622; 2 Dillon on Municipal Corporations, 3d ed., secs. 996-1000.)

It must affirmatively appear that the municipality has been guilty of negligence, and the general rule is that the occurrence of an accident does not raise the presumption of negligence. (*Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Bahr v. Lombard Ayers & Co.*, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; *Denver & R. G. R. Co. v. Fotheringham*, 17 Colo. App. 410, 68 Pac. 980.)

It is the duty of one who is exposed to a known danger, although he may not know the full extent of it, to use ordinary care to protect himself from any injury whatever, and he is guilty of contributory negligence if he is the author of any part of the injury resulting from his failure to exercise such care, or if, by the exercise of such care, he could have avoided the consequence of negligence ascribed to another. (*Read v. City etc. Ry. Co.*, 115 Ga. 366, 41 S. E. 629; citing *City of Columbus v. Ogletree*, 96 Ga. 177, 22 S. E. 709; *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661, 64 Am. St. Rep. 922, 28 S. E. 733, 39 L. R. A. 499; *Huber v. Lacrosse City R. Co.*, 92 Wis. 636, 53 Am. St. Rep. 940, 66 N. W. 708, 31 L. R. A. 583; *Wood v. Diamond Electric Co.*, 185 Pa. St. 529, 39 Atl. 111; *Coates v. Burlington & R. Co.*, 62 Iowa, 486, 17 N. W. 760; *Neal v. Marion*, 126 N. C. 412, 35 S. E. 812; *Neal v. Marion*,

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129 N. C. 345, 40 S. E. 116; *Anderson v. Jersey City Elec. Co.*, 64 N. J. L. 664, 46 Atl. 593; *Thomas v. Western Union Tel. Co.*, 100 Mass. 156; *Criss v. Seattle Electric Co.*, 38 Wash. 320, 80 Pac. 525; *McGraw v. Friend & Terry Lumber Co.*, 120 Cal. 574, 52 Pac. 1004; *Dickey v. Maine Tel. Co.*, 43 Me. 492; *Town of Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256; *Indianapolis v. Cook*, 99 Ind. 10; *Bruker v. Covington*, 69 Ind. 33, 35 Am. Rep. 202; *Chicago v. Richardson*, 75 Ill. App. 198; *Harris v. Town of Clinton*, 64 Mich. 447, 8 Am. St. Rep. 442, 31 N. W. 425; *Claus v. Northern S. L. Co.*, 89 Fed. 646, 32 C. C. A. 282; *Cook v. Wilmington City Elec. Co.*, 9 Houst. (Del.) 306, 32 Atl. 643.)

Rhea & Son, for Respondent.

The decided weight of authority holds that a city is liable in damages for the negligent acts of its agents and servants in the course of their employment. (*Fox v. City of Philadelphia*, 208 Pa. St. 127, 57 Atl. 356, 65 L. R. A. 214; *Kleopfert v. City of Minneapolis*, 93 Minn. 118, 100 N. W. 669; *Buser v. City of Cedar Rapids*, 115 Iowa, 683, 87 N. W. 404; *The Major Reybold*, 111 Fed. 414; *City of Mobile v. Bienville Water Supply Co.*, 130 Ala. 379, 30 South. 445; *Wagner v. City of Portland*, 40 Or. 389, 67 Pac. 300, 60 Pac. 985; *Gorney v. City of New York*, 102 App. Div. 259, 92 N. Y. Supp. 451; *Butman v. City of Newton*, 179 Mass. 1, 88 Am. St. Rep. 349, 60 N. E. 401; *Twist v. City of Rochester*, 165 N. Y. 619, 59 N. E. 1131; *Ostrom v. City of San Antonio*, 94 Tex. 523, 62 S. W. 909; *Town of Colorado City v. Leafe*, 28 Colo. 468, 65 Pac. 630; *Chicago v. McGraw*, 75 Ill. 566-570; *Cooper v. Athens*, 53 Ga. 638; *Haag v. Board of Commrs.*, 60 Ind. 511, 28 Am. Rep. 654.)

The supreme court of this state has firmly settled the question of the liability of a city for obstructions in its streets, in the absence of a statute on the subject of liability, in the case of *Carson v. City of Genesee*, 9 Idaho, 244, 108 Am. St. Rep. 127, 74 Pac. 862. To the same effect are *Morton v. Village of St. Anthony*, 9 Idaho, 532, 75 Pac. 262; *Village of*

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Sandpoint v. Doyle, 11 Idaho, 642, 83 Pac. 598, 4 L. R. A., N. S., 810.

The city of Weiser is liable in this case, not only because the accident happened in the streets of the city, but also because the electric light wire which was the cause of the damage complained of was owned by the city and under its management and control. A municipal corporation is liable upon the same principle as an individual citizen for acts of non-feasance or negligence of its servants in the construction and management of its various improvements, in the absence of an express statute to the contrary. (*Wallace v. Muscatine*, 4 G. Greene (Iowa), 373, 61 Am. Dec. 131-133; *Cotes v. City of Davenport*, 9 Iowa, 235; *Bailey v. Mayor etc. of New York*, 3 Hill (N. Y.), 532; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463, 53 Am. Dec. 316; *Ross v. City of Madison*, 1 Ind. 281, 48 Am. Dec. 361; 2 Dillon on Corporations, sec. 954; *Shearman & Redfield on Negligence*, 4th ed., sec. 286; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 185, 72 Am. Dec. 730; *Cooley on Constitutional Limitations*, 249; *Esberg-Gunst Cigar Co. v. City of Portland*, 34 Or. 282, 75 Am. St. Rep. 651, 55 Pac. 961, 43 L. R. A. 435; *Twist v. City of Rochester*, 55 N. Y. Supp. 850, 35 App. Div. 508; *Keasby on Electric Wires*, 2d ed., 312; *Aschoff v. City of Evansville*, 34 Ind. App. 25, 72 N. E. 279; *Dunstan v. City of New York*, 91 App. Div. 355, 86 N. Y. Supp. 562.)

Defendant was using a dangerous force, and one not generally understood. It was required to use very great care to prevent injury to person or property. (*Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108, 28 L. R. A. 596; *Perham v. Portland Gen. Electric Co.*, 33 Or. 451, 72 Am. St. Rep. 730, 53 Pac. 14-24, 40 L. R. A. 799; *Denver Con. Electric Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Cook v. Wilmington City Electric Co.*, 9 Houst. (Del.) 306, 32 Atl. 643.)

The decided weight of authority holds that when a person becomes entangled in an electric wire hanging in a public highway at a height liable to cause injury, it raises a presumption of negligence against the owner or controller of that

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wire. (*Ugla v. West End Street R. Co.*, 160 Mass. 353, 39 Am. St. Rep. 481, 35 N. E. 1126; 2 Thompson on Negligence, 1220; Thompson on Electricity, sec. 178; *Stephens & C. Trans. Cos. v. Western Union Tel. Co.*, Fed. Cas. No. 13,371, 8 Ben. 502; *Western Union Tel. Co. v. Eyser*, 2 Colo. 141; *Blanchard v. Western Union Tel. Co.*, 60 N. Y. 510.)

AILSHIE, J.—The respondent obtained a judgment against the city of Weiser for \$1,050 and costs for personal injuries received by him on account of the negligence of the city in maintaining an electric light wire across one of the principal thoroughfares of Weiser. The city owns and is operating an electric light system for the purpose of lighting its streets and selling to the inhabitants of the municipality electric light. It appears that at about noon on the seventh day of March, 1904, a tree was felled by some one across one of the principal streets and struck the electric light wire which was stretched diagonally across the street. After the tree was removed the wire remained sagged about nine feet above the center of the street. It seems that this wire continued sagging until 5 or 6 o'clock that evening, when it was less than eight feet from the ground. One of the employees, who was a lineman and who had charge of the repair of wires, was notified about 2 o'clock that afternoon; and later in the afternoon the foreman and general manager and superintendent of the system was also notified of the condition of the wire. Yet nothing appears to have been done toward repairing or raising the wire; and, as evening came on, a current of about two thousand three hundred volts was turned on to the wire. During the evening of that day the travelers along that street, either on horseback or with team, appear to have been obliged to turn to one side or the other in order to avoid striking the wire, and one witness testifies that in passing along about 5:45 in the evening the wire struck him and he received a considerable shock from it. The plaintiff was a schoolboy, some seventeen years old, and at some time during the afternoon noticed that the wire was sagging across the street. That evening between 6 and 7 o'clock he was sent to town on an errand. He went on horseback,

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and it was a dark, rainy night. He says he went down another street and remained down town about three-quarters of an hour and returned on the street over which this wire was stretched. He says: "I started home up Main street, trotting a part of the way. I was in a hurry to get out of the rain and I was coming back to Mrs. Daly's entertainment at the opera-house. I had to take the horse back and I had to dress up. There were lights as I went home, one by the opera-house; there was one at the Monroe creek bridge, one at Mr. Hass' house and one at the Baptist Church, and there was one just below Mr. Sater's on Tenth street, about a block below Mr. Sater's. I did not notice any other lights in the streets at all. Something happened there by Mr. Sater's place. The last thing I remember was seeing Mr. Clayburgh sitting in his store talking to someone, and then I saw a flash, and that was the last I remember. The next I remember is the next morning some of the folks came in there and I woke up and asked them what was the matter with my hand. I do not remember of there being any obstruction in the street that night at all. I knew the wire was there but I didn't know it was down." No one saw the occurrence, but it is in evidence that the boy was badly injured from an electric shock, and it is also equally certain that he received it from this wire. The city contends, however, that he was guilty of such contributory negligence as to prevent a recovery, and predicates that contention principally upon the fact that the wire came in contact with his hand only. It is argued that if he had not been reaching for the wire that it would have necessarily struck his head or body, and that the very fact that it first came in contact with his hand is an evidence that he had extended his hand in the direction of the wire. We don't think this circumstance is sufficient to establish such contributory negligence as to prevent a recovery. There might be a great many explanations made as to why his hand was extended and struck the wire first; indeed, the wire might, as a matter of fact, have struck the body first, but not in such a way as to complete the electric circuit, and the plaintiff would have immediately at-

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tempted to remove it with his hand. Such action would have been almost involuntary. On the other hand, he might have seen the wire an instant before coming in contact with it and have thrown up his hand to ward it off. In our view of the facts of this case, however, it is unnecessary to speculate as to how this occurred.

The first contention made by appellant is that the city is not liable for personal injuries to individuals occasioned through the negligence of officers of the corporation to properly perform their duties. We had occasion to give this contention very careful consideration in the case of *Carson v. City of Genesee*, 9 Idaho, 244, 108 Am. St. Rep. 127, 74 Pac. 862. In that case we held that: "Cities and villages incorporated under the general laws of Idaho, which grant to such municipal corporations exclusive control over their streets, avenues, lanes and alleys are liable in damages for a negligent discharge of the duty of keeping such streets and alleys in a reasonably safe condition for use by travelers in the usual modes." We are satisfied with the doctrine announced in that case, and do not think it necessary to again go into a consideration of the reasons for such a rule. It has been followed by this court in *Moreton v. Village of St. Anthony*, 9 Idaho, 532, 75 Pac. 262, *Village of Sand Point v. Doyle*, 11 Idaho, 642, 83 Pac. 598, 4 L. R. A., N. S., 810. In the case of *Moreton v. St. Anthony* we did say, however, "that a municipality is not guilty of negligence for every act or omission which would constitute negligence on the part of an individual. Much discretion is vested in such bodies." In the present case it is quite clearly established that the city did have ample and abundant notice of the condition of this wire. Notice to the employees of the city who had charge and control of its electric light system, and whose duty it was to keep it in order and to repair wires and the like, was notice to the city. A municipality can only act through officers and agents, and notice to an officer, agent or employee concerning the condition or status of a particular and specific business for and about which he is engaged is notice to the municipality itself. Aside,

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however, from the duty which municipalities owe to the public to keep their streets and thoroughfares in a reasonably safe condition for use by travelers in the usual modes, there is another and even stronger reason why the city should be held liable in this case. The city was engaged in a private enterprise, namely, that of manufacturing and selling electric light to its inhabitants. Such an engagement or enterprise is not one of the public governmental duties of municipalities. Municipal ownership in the usual and common acceptation of that term must of necessity carry with it the same duty, responsibility and liabilities that are imposed upon and attach to private owners of similar enterprises. If the city owns and operates an electric light system and sells light to its inhabitants, there is no reason why it should not be held to the same responsibility for injuries received on account of its negligent conduct of the business as would a private individual be who might be running an opposition plant in the same municipality and selling light to the citizens thereof. There is abundant authority to be found in the books in support of this position. As early as 1858, the supreme court of Pennsylvania in *Western Savings Fund Soc. v. City of Philadelphia*, 31 Pa. St. 185, 72 Am. Dec. 730, said: "The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the

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grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchise had been conferred."

Mr. Dillon, in volume 2 of his work on Municipal Corporations, at section 954, says: "A municipal corporation owning waterworks or gasworks which supply private consumers on the payment of tolls is liable for the negligence of its agents and servants the same as like private proprietors would be." And again, at section 985 of the same work, in speaking of the liability of a municipality "as a property owner," says: "Upon similar grounds, municipal corporations are liable for the improper management and use of their property, to the same extent and in the same manner as private corporations and natural persons."

In volume 1 of Shearman and Redfield on Negligence, section 286, the authors say: "In its proprietary or private character a municipal corporation may engage in enterprises for its own immediate profit or advantage as a corporation, although inuring ultimately, of course, to the benefit of the public. Of this character are waterworks, to supply water to consumers; or gasworks, to supply gas, on payment of rates or tolls, and other similar enterprises. In respect of its liability for negligence in the construction and maintenance of such works, the corporation is on the same footing with private proprietors, and is liable for the negligence of its agents in the management of its business."

In *Ashoff v. City of Evansville*, 34 Ind. App. 25, 72 N. E. 279, the Indiana appellate court entered into a somewhat extended discussion as to the distinction between those acts of municipal corporations that fall within and are necessarily performed under authority of the sovereign, governmental or public power and duty devolving upon such corporations, and those acts and undertakings in which they engage in their private and business capacity. After pointing out many dis-

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tinctions, the court arrives at the following conclusions: "Where the water system is conducted by the municipality in part for profit, even if principally for public purposes, the municipality is liable for damages caused by its negligent management. (*Chicago v. Selz etc. Co.*, 104 Ill. App. 376.) And where it supplies water to its citizens, and charges therefor, it acts in its private capacity, although such waterworks system is also used for the extinguishment of fires. So acting, 'it stands on the same footing as would any individual or body of persons upon whom a like special franchise had been conferred.' "

One of the most carefully considered and tersely stated cases we have examined on this subject is that of *Esberg-Gunst Cigar Co. v. City of Portland*, 34 Or. 282, 75 Am. St. Rep. 651, 55 Pac. 961, 43 L. R. A. 435. After reviewing a number of authorities, the court said: "In accordance with this distinction it is quite universally held that when a municipal corporation voluntarily undertakes to construct and maintain water or gasworks in pursuance of statutory authority, for the purpose of supplying the inhabitants thereof with water or gas at rates established by the city, it is liable for an injury in consequence of its acts in constructing and maintaining such works, the same as a private corporation or individual." To the same effect as the foregoing authorities, see 2 Beach on Public Corporations, sec. 1140; Cooley on Constitutional Limitations, p. 249; 20 Am. & Eng. Ency. of Law, 2d ed., 1205; *Dunston v. City of New York*, 91 App. Div. 355, 86 N. Y. Supp. 562.

The city was using this wire across one of its public thoroughfares for the purpose of carrying and distributing a most powerful and dangerous force, and one but poorly understood by the masses. Aside from its duty to maintain its streets in a reasonably safe condition, it was under a much greater duty, as the owner and operator of a lighting system, to exercise diligence and care commensurate with the dangers of the force it was handling in order to avoid and prevent injury to those rightfully engaged in their various pursuits and employments. (*Perham v. Portland General Elec. Co.*,

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33 Or. 451, 72 Am. St. Rep. 730, 53 Pac. 14, 40 L. R. A. 799; *Giraudi v. Elec. Imp. Co.*, 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108, 28 L. R. A. 596; *Denver Con. Elec. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Cook v. Wilmington City Elec. Co.*, 9 Houst. (Del.) 306, 32 Atl. 643; *Macon v. Paducah St. R. Co.*, 110 Ky. 680, 62 S. W. 496; *Economy Light Co. v. Stephen*, 187 Ill. 137, 58 N. E. 359; 15 Cyc. 471; *City of Denver v. Sherrett*, 88 Fed. 226, 31 C. C. A. 499; Joyce on Electric Law, secs. 450, 451; Croswell on Electricity, sec. 234.)

The plaintiff was a mere boy, attending the public schools, and it would not be presumed that he was very familiar with electricity; and, in fact, it is not shown that he had any particular knowledge of its dangers more than would be possessed by any other boy of that age. He was traveling along the public highway where he had a right to be. He was not a servant or employee of the defendant, and was chargeable with no duty to it other than that arising from his citizenship in the municipality. That he was seriously and permanently injured is undoubted. Having notice, as the city had in this case, it was negligence to allow a live wire charged with a deadly current to remain suspended over a street in such manner that it was likely to come in contact with persons on horseback or in vehicles traveling along that thoroughfare. The evidence abundantly supports the verdict and judgment.

We have examined the rulings complained of in the admission and rejection of evidence, and we do not think any error was committed in the rulings of the court in those respects.

The appellant complains of the action of the court in giving a number of instructions. Appellant urges that the instructions were in many instances conflicting and confusing, and that in one instance they invaded the province of the jury as to matters of fact, and that the instruction on contributory negligence is erroneous and prejudicial to the appellant. It is unnecessary to repeat these instructions at length here or to deal with the objections made in detail. Our examination of them has failed to disclose any material inconsistency or any invasion of the province of the jury. The court does

Points Decided.

not appear to have expressed any opinion upon the facts. It is true that the instructions are given on the theory that the plaintiff had suffered an injury, and our examination of the record discloses to us that there was no dispute, but that the plaintiff had received a serious injury; the only dispute on that point was as to the extent and gravity of the injuries received. That matter was properly submitted to the jury, and was evidently considered by them in fixing the amount of damages. Upon the objection that the court incorrectly stated the law of contributory negligence, we are satisfied no error was committed against the city. The instruction, if it varies at all from the true rule, is more favorable to the city than it was entitled to have given, and it has no cause for complaint against the instruction as it was given. A detailed consideration and discussion of the numerous rulings of the court and instructions given to which the appellant has taken exceptions would be of no particular value or importance here, and we therefore refrain from any further consideration of them in this opinion.

We find no error in the record that would justify the reversal of the judgment. The judgment is affirmed, with costs in favor of the respondent.

Stockslager, C. J., and Sullivan, J., concur.

(July 7, 1906.)

AGNES LORETTA DAY, Appellant, v. EUGENE RUFUS DAY, Respondent.

[86 Pac. 531.]

CHANGE OF VENUE—BIAS AND PREJUDICE OF JUDGE—CONSTITUTIONAL LAW—SELF-EXECUTING PROVISIONS OF CONSTITUTION—DISQUALIFICATION OF JUDGE—ALLOWANCE OF ATTORNEY'S FEES.

1. Under the provisions of section 18, article 1 of the constitution of Idaho, as well as by the unwritten dictates of natural justice, the courts of this state are commanded to administer justice without prejudice.

Argument for Appellant.

2. The provisions of said section are self-executing, and the legislature by failing to provide, by proper legislation, that the prejudice of the judge is a cause for a change of the place of trial, cannot nullify the provisions of said section and thus compel the trial of a case before a prejudiced judge.

3. Section 3900, Revised Statutes, was enacted before the adoption of our constitution, and provides three grounds for a change of venue, but does not make the prejudice of the judge one of said grounds.

4. Section 4125, Revised Statutes, provides among other grounds, that a change in the place of trial may be had when from any cause the judge is disqualified from acting and, although enacted prior to the adoption of our constitution, is broad enough in its terms to include the disqualification on the ground of prejudice of the judge; and the constitution makes prejudice a ground of disqualification.

5. Neither the constitution of California nor Montana commands the courts to administer justice without "prejudice" as does the constitution of Idaho.

6. Public confidence in our judicial system and courts of justice demands that causes be tried by unprejudiced and unbiased judges.

7. Where it appears that the defendant has means with which to pay, and his wife is without means to properly prosecute her suit for a divorce, the court will allow her suit money and counsel fees.

(Syllabus by the court.)

APPEAL from the District Court of the First Judicial District for Shoshone County. Hon. Ralph T. Morgan, Judge.

Appeal from an order denying a change of venue on the ground of prejudice of the judge. *Reversed.*

F. C. Robertson, Henry P. Knight and John P. Gray, for Appellant.

The declaration of rights in our constitution is self-acting, self-executing and requires no legislative provision for its enforcement, and cannot be annulled, abridged or modified by any legislative or judicial act.

The rule formerly established by the supreme court of California produced such a great injustice in that state that

Argument for Respondent.

at a subsequent date the legislature enacted a statute disqualifying a judge on account of bias and prejudice. (Code Civ. Proc., sec. 170, as amended in 1897.)

In the cases which have been presented to the supreme court of California involving this question since that date, it has been held that bias and prejudice of the judge was a good ground for changing the venue of the action. (*People v. Compton*, 123 Cal. 403, 56 Pac. 44; *Morehouse v. Morehouse*, 136 Cal. 332, 68 Pac. 977.)

It is a primary idea in the administration of justice that a judge must be free from bias, prejudice and partiality. (*Stockwell v. Township Bd. of White Lake*, 22 Mich. 341.)

This court has held that a new trial may be granted in a case not provided for in the statutes where a constitutional right of the defendant has been violated. (*State v. Bland*, 9 Idaho, 796, 76 Pac. 780; *State v. Wroth*, 15 Wash. 621, 47 Pac. 106; *State ex rel. Partridge & Co. v. Superior Court*, 40 Wash. 443, 111 Am. St. Rep. 915, 82 Pac. 875, 2 L. R. A., N. S., 568.)

While it is better that facts as to the alleged prejudice should be presented, it does not appear to be absolutely necessary a mere suggestion or imputation usually being sufficient. (4 Ency. of Pl. & Pr. 408.)

C. W. Beale, W. W. Woods, John H. Wourms and W. E. Borah, for Respondent.

The framers of our constitution contented themselves with retaining in force the territorial laws, and, in addition thereto, with vesting in the legislature the power to provide by law the methods of procedure in all the courts below the supreme court. Hence, we are not to look to the constitution, but to the acts of the legislature, for authority and guidance upon the matter of the change of venue. (*Stanley v. United States*, 71 Okla. 336, 33 Pac. 1025.)

Section 18, article 1 of the constitution has nothing to do with the question of change of venue, makes no provision for

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the practice governing such proceeding, does not in any manner prescribe any disqualification of a judge or anybody else. in no degree limits or enlarges the jurisdiction of the courts, but, as stated by the supreme court of Ohio, together with the other sections that make up the Bill of Declaration of Rights, amounts merely to an "enunciation of axiomatic truths and principles."

Where the grounds which will operate to disqualify a judge are expressly set out in the statutes, such provisions are exclusive, and no other causes than those set forth will work a disqualification. (*Patterson v. Police Court*, 123 Cal. 453, 56 Pac. 105; *In re Jones*, 103 Cal. 397, 37 Pac. 385; *People v. Williams*, 24 Cal. 31; *People v. Mahoney*, 18 Cal. 186; *People v. Shuler*, 28 Cal. 495; *Hibberd v. Smith*, 39 Cal. 148; *Bulwer Con. Min. Co. v. Standard Con. Min. Co.*, 83 Cal. 613, 23 Pac. 1109, 1111; *Taylor v. Williams*, 26 Tex. 585.)

The court has no authority to change the venue of civil cases except as provided by statute. (*Commercial Nat. Bank v. Davidson*, 18 Or. 57, 22 Pac. 517; *People v. McGarvey*, 56 Cal. 327; *Heath v. Mathiew*, 19 Wis. 127; *Shannon v. Smith*, 31 Mich. 450, 451; *Zelle v. McHenry*, 51 Iowa, 572, 575, 2 N. W. 264.)

Where there is a counter-showing of an equal number of affidavits to those filed by the defense to the effect that in their opinion the defendant can have a fair and impartial trial, an order of the district judge denying such application for a change of venue will not be reversed on appeal. (*State v. Rooke*, 10 Idaho, 388, 79 Pac. 82.)

The judge had the jurisdiction to decide the question of his own bias and to try the cause if he found the charge unsustained. (*Talbot v. Pirkey*, 139 Cal. 326, 73 Pac. 858; *Allen v. Reilly*, 15 Nev. 452-455; *Hungerford v. Cushing*, 2 Wis. (397), 292; *State v. Morrison*, 67 Kan. 144, 72 Pac. 554.)

SULLIVAN, J.—This action was commenced on the ninth day of December, 1905, by the appellant against the respondent, to obtain a divorce, on the ground of extreme cruelty,

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and a settlement of their property rights. Thereafter the respondent answered and filed his cross-complaint, demanding a divorce from the appellant on the same ground. The appellant answered the cross-complaint, thus putting in issue the material allegations of both the complaint and cross-complaint. Thereafter the appellant made her motion for a change of the place of trial, supported by her own affidavit and the affidavits of three of her attorneys. Said application was made upon the ground that she could not have a fair and impartial trial before the presiding judge on account of his prejudice in the matter. The answer and the cross-complaint cover about eighty pages of the printed transcript; and the answer to the cross-complaint occupies about fifty-seven pages of the transcript; and the charges, crimination and recrimination contained in said cross-complaint and answer thereto show, indeed, a most deplorable state of affairs. In the cross-complaint, among many other things, the attorneys for respondent are charged with entering into a conspiracy for the purpose of extorting money from the respondent; and in the answer to the cross-complaint one of the attorneys for the respondent, and various other persons and detectives and persons of low character, are charged with entering into a conspiracy for the purpose of blackmailing appellant's reputation, depriving her of her rights and defrauding her of her property.

The application for the change in the place of trial was based upon the pleadings and the affidavits of appellant and her counsel, and the latter show the bias and prejudice of the presiding judge. In reply to said application the respondent filed some sixty-five affidavits, in number, of citizens of Shoshone county, showing the high regard in which they held the presiding judge, and swearing that, in their opinion, he was not biased and prejudiced in the case. Before the hearing on said motion, counsel for appellant moved to strike out fifty-five of said affidavits for the reason that they were incompetent, irrelevant and immaterial, and filed only for the purpose of encumbering the record and not answering

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any of the charges set forth in the application for the change of venue. Said motion was denied. Thereafter, on the hearing counsel for the appellant offered to read the affidavits in support of the motion for a change of venue to the court, and insisted on the right to argue said motion in the presentation of said application, which offer was denied by the court. Counsel for appellant thereupon tendered to the court for cross-examination the persons who had made the affidavits for the appellant, upon the application for change of venue, and the court refused to permit such cross-examination. Said motion was thereafter taken under advisement and a written opinion was filed by the judge denying the same. The principal ground upon which the court based its opinion is that the prejudice of a judge is not a cause, under our statute, for change of venue. He also in his written opinion states that he could give plaintiff and her counsel a fair and impartial hearing in the case. The several errors specified are substantially as follows:

- (1) Error in refusing to strike out the fifty-five affidavits.
- (2) In refusing to permit counsel for appellant on the hearing to read the affidavits in support of the application for change of the place of trial.
- (3) Refusing counsel the right to argue such application.
- (4) Refusal to receive other evidence aside from the affidavits.
- (5) Denying plaintiff's application for change of place of trial.
- (6) Injecting into the record, under the guise of an opinion, a statement pretending to be the statement of facts, and attempting to discredit the attorneys of the appellant.
- (7) In considering, or pretending to consider, matters of personal knowledge not supported by affidavit or any evidence in passing upon said motion.

It is contended by counsel for appellant that under the provisions of section 18, article 1 of the constitution of Idaho, "the people have prohibited a court from trying a case in which he is prejudiced by or for either party." Said section

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is as follows: "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay or prejudice." They also cite paragraph 40 of the Magna Charta, which reads: "To none will we sell; to none will we deny or delay right or justice." They contend through that constitutional provision that the people have declared that justice shall be administered not only without sale, without denial and without delay, but also without prejudice, and contend that the legislative power to pass laws regulating the change of venue is limited by constitutional provisions respecting the subject. (4 Ency. of Pl. & Pr. 377.) It is contended that said section of the constitution is self-acting, self-executing, and requires no legislative provision for its enforcement, and cannot be abridged or modified by any legislative or judicial act. There is no question but what said provision is self-operating, and it is regarded as settled in this country that all negative or prohibitive clauses in a constitution are self-executing. (*Law v. People*, 87 Ill. 385; *Davis v. Burk*, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210; *Cooley's Constitutional Law*, p. 98; *Willis v. Mabon St. P. S. C.*, 48 Minn. 140, 31 Am. St. Rep. 626, 50 N. W. 1110, 16 L. R. A. 281; *State v. Kyle*, 166 Mo. 287, 65 S. W. 767, 56 L. R. A. 115.) The legislature, neither by neglect to act nor by legislation, can nullify a mandatory provision of the constitution.

Section 3900, Revised Statutes of 1887, which was adopted prior to the adoption of the constitution of this state, is as follows: "A judge cannot act as such in any of the following cases: 1. In an action or proceeding to which he is a party, or in which he is interested; 2. When he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law; 3. When he has been attorney or counsel for either party in the action or proceeding. But this section does not apply to the arrangement of the calendar or the regulation of the order of business, nor to the power of transferring the cause to another county." That

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section provides that a judge cannot act in either of the three cases enumerated therein; and it is contended by counsel for respondent that he may act in all other cases regardless of his bias or prejudice. Section 4125 of the Code of Civil Procedure provides: "The court may on motion change the place of trial. . . . (4) When from any cause the judge is disqualified from acting." Said section 18 of article 1 of the constitution provides that right and justice shall be administered without sale, denial, delay or prejudice. The courts administer justice in this state, and if it appears that the judge has prejudice against either of the parties, it was not supposed that he could administer justice. Under the provisions of said section 4125 of the Code of Civil Procedure, the judge may, on motion, change the place of trial when from any cause he is disqualified from acting, and said provision of the constitution disqualifies a judge from acting when he is prejudiced in the case. For it cannot be maintained that a judge who is biased or prejudiced in a case on trial before him can administer justice without prejudice. Disregarding said provisions of the constitution, the ordinary principles of right and justice prohibit or disqualify a judge from trying a case in which he is prejudiced for or against either of the parties to the suit. This provision of the constitution cannot be brushed aside by saying that it is a mere maxim of the law and means nothing. For the principle therein expressed is one of the foundation-stones of our judicial system and jurisprudence, and could not be removed without shattering the entire system.

The trial court took the position that the prejudice of a judge was no ground under our statute for a change in the place of trial, and cites in support of that position, *McAulay v. Weller*, 12 Cal. 500, *People v. Mahoney*, 18 Cal. 186, *People v. Williams*, 24 Cal. 31, *People v. Shuler*, 28 Cal. 490, *Hibberd v. Smith*, 39 Cal. 148, *Bulwer Co. Min. Co. v. Standard Con. Min. Co.*, 83 Cal. 613, 23 Pac. 1109, and other cases. The most of said cases were jury cases, and the court had no duty to perform except to pass upon questions of law and not

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upon the evidence. Those decisions were based on the ground that the statute of California did not authorize a change of place of trial because of the prejudice of the judge. It evidently became so apparent that the bias and prejudice of a judge was such a potent factor in the trial of a cause, resulting in throwing discredit on the courts and bringing them into disrepute, that the legislature made bias and prejudice of the judge a cause for a change of venue. (See sec. 170 as amended in 1897.)

It has been suggested in some of said cases that the errors of the judge, if he be moved by prejudice, may be corrected on appeal. While many of his errors might be so corrected, there are certain presumptions in favor of his rulings, and he can make orders which cannot be disturbed unless there has been a gross abuse of discretion.

In *McAulay v. Weller*, *supra*, Chief Justice Terry said: "The exhibition by a judge of partisan feeling or the unnecessary expression of an opinion upon the justice or merits of the controversy, though exceedingly indecorous, improper and reprehensible as calculated to throw suspicion upon the judgments of the court and bring the administration of justice into contempt, are not under our statute sufficient to authorize a change of venue on the ground that the judge is disqualified from sitting." It was, therefore, recognized by the courts of California and the people that justice demanded a statute authorizing a change of venue on the ground of the bias or prejudice of the judge, and a statute was finally enacted. The framers of our constitution no doubt recognized the potent power and injustice of bias and prejudice in judicial proceedings, and declared in said section 18, article 1, that justice in this state must be "administered without sale, denial, delay or prejudice." Since the adoption of said amendment the cases of *People v. Compton*, 123 Cal. 403, 56 Pac. 44, and *Morehouse v. Morehouse*, 36 Cal. 332, 68 Pac. 677, involving the question at bar, have been decided by the supreme court of California, and there held that the bias

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and prejudice of the judge was a good ground for changing the place of trial.

The constitution of California has no provision like section 18, article 1 of the constitution of Idaho, and does not declare that justice shall be administered without prejudice. and the supreme court of that state held that the legislature had the power to prescribe the grounds on which a change in the place of trial could be had, and that courts were limited to the grounds specified in the statute.

The judge in determining the matter before us relied to some extent on the case of *In re Davis' Estate*, 11 Mont. 1, 27 Pac. 346. The supreme court of Montana based that opinion on the fact that the statute of that state did not specifically provide for a change of venue on the ground of bias and prejudice of the judge. In that opinion are cited decisions from California and other states, and it refers to the reason for the rule as stated in some of those decisions, and pronounces them unsound, and concurs with Hayne on New Trial and Appeal, section 32, where the author says: "The true reason of the rule in *McAulay v. Weller*, that bias does not disqualify a judge, is that such ground is not specified in the statute as a ground of disqualification." That is the identical ground on which the California and Montana decisions are based. It must be remembered that the rule of strict construction prevailed in California at the time of the decision of *McAulay v. Weller*, *People v. Mahoney*, *People v. Williams*, and *People v. Shuler*, *supra*; and it must be remembered that the constitution of California has no provisions corresponding to the provisions of section 18, article 1 of the constitution of Idaho.

In Montana, after the decision of *In re Davis' Estate*, *supra*, the necessity of a change of venue by reason of the bias or prejudice of the judge for a fair administration of justice became very urgent, and the legislature relieved the situation by enacting a law making the bias and prejudice of the judge a ground for a change of venue. The holding of the

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Montana court that the bias or prejudice of the judge was no ground for a change of venue, moved the supreme court of that state in the noted case of *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123, to use the following just and strong language: "No judgment of a court of justice so tainted with corruption as the record leaves this should stand, and its cancellation in this instance will be the evidence of the determination of this court to pursue to the utmost its constitutional and lawful authority, to the end that public confidence in our judicial system may not be lessened and that the fountain of justice may be kept pure." The framers of our constitution guarded with special care our judiciary and tried to place it above suspicion of unfairness, passion or prejudice, so that the public confidence in it would not be shaken, and provided that justice should be administered without prejudice. In many of the cases cited the courts have clearly indicated a regret that bias and prejudice of a judge was not made a statutory ground for a change in the place of trial, and disapproved in strong language that a judge swayed by personal bias and prejudice was powerless to injure his foe or render aid to his friend, simply because if he made an error it could be corrected on appeal. In *Re Davis' Estate*, *supra*, the court said: "We disapprove every suggestion and claim that a judge who is swayed by personal bias and prejudice is powerless to injure his foes or render aid to his friends because his errors can be corrected on an appeal to a superior tribunal. There are presumptions in favor of his rulings which cannot be ignored, and he can make orders which cannot be disturbed unless there has been a gross abuse of his discretion." And quotes in that decision from *Williams v. Robinson*, 6 Cush. (Mass.) 333, as follows: "Conscious bias or prejudice in favor of one of the parties or against the other, caused by hearing an *ex parte* statement of the facts of the case, is an inability or disability to try the case within the just meaning of the statutes. . . . It was not necessary that the statutes should enumerate all the disqualifications of the standing justice. The rules of the com-

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mon law and the principles of natural justice are to be applied in the construction of these statutes."

In the light of the judicial history of California and Montana in holding that the bias and prejudice of a judge was no ground for a change of venue, it is now recognized by those states that it ought to have been a ground, that it is a matter conducive to a just and proper administration of justice. The constitution of Montana, section 6, article 3, is as follows: "The courts of justice shall be open to every person and a speedy remedy offered for any injury of person, property or character; and that right and justice shall be administered without sale, denial or delay." The main difference between that section and section 18, article 1 of the constitution of Idaho, is that in the latter we find the word "prejudice" after the word "delay," and provides that justice shall be administered without sale, denial, delay or prejudice, that being a clear distinction and difference between the two constitutions. It is a primary idea in the administration of justice that a judge must not decide judicial matters from bias, prejudice and partiality, and our constitution clearly prohibits a judge who has bias or prejudice in a case from trying it. The aim and object of the framers of the constitution was to preserve judicial tribunals from discredit, and the supreme court of Montana, referring to this matter in *Stockwell v. Township Board of White Lake*, 22 Mich. 341, said: "The court ought not to be astute to discover refined and subtle distinctions to save a case from the operation of the maxim, when the principle it embodies bespeaks the propriety of its application. The immediate rights of the litigants are not the only objects of the rule. A sound public policy which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance." Can it be contended in the face of the command of said provision of our constitution that the legislature could legally declare that the bias and prejudice of a judge should be no cause for a change of venue? I think not. And if, in the face of that provision, the legis-

lature neglects to specify in a statute that the prejudice of the judge is a ground for a change of the place of trial, then the very object and purpose of that provision of the constitution may be nullified and set at naught. Regardless of the statutory provision, where such a state of facts appear, as in the case at bar, and a change of place of trial is demanded because of the prejudice of a judge, a change of venue, or at least a change of judges, should be granted to preserve from discredit the judiciary of the state. No technical refinement of argument can convince the people that a prejudiced judge can fairly try a case between his friend and his foe. Such a thing might occur, but the general public would not look upon such a trial as an administration of justice without prejudice. The statute provides the manner. the procedure by which a change of venue may be had, and the procedure there provided is a proper procedure in a case where the application is made on the ground of the prejudice of the judge.

It will be useless for us to pursue this matter further, as under the constitution and laws of this state a judge who cannot administer justice in a case without prejudice must not try the same.

It is contended that the affidavits on the part of the appellant do not show bias and prejudice, and that if so, they have been fully met by other affidavits showing the high and honorable character of the trial judge. It must be conceded that judges are susceptible to bias and prejudice the same as other men, and we think the record shows such a state of affairs or condition, that it would bring discredit upon the judiciary to permit a trial before the present judge, and therefore conclude that another judge must be called to try the case, as may be done under the provisions of section 12. article 5 of the constitution of Idaho. It will no doubt be less expensive to both parties to try the case in Shoshone county.

The order denying a change of venue is reversed and the cause remanded, with instruction to the trial judge to grant

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a change of place of trial or call in some other district judge to try the case, as the main purpose of this application was to secure another judge to try the case. Costs are awarded to appellant.

Application for an allowance of \$1,500 counsel fees with which to pay appellant's attorneys on this appeal has been made by her, and on the hearing of this case time was given to counsel for the respondent to show to this court that appellant was able and had means with which to pay her counsel. In pursuance thereof a number of affidavits have been filed in the matter. They and the record show that the respondent is a wealthy man, worth several hundred thousand dollars, and it is not shown anywhere that the appellant has any means whatever with which to pay her counsel. The main defense to such allowance is that the appellant has made arrangements with her counsel for a contingent fee to be recovered in event of her success in her suit for divorce, and for that reason appellant does not need any allowance to enable her to prosecute her action, which is denied on behalf of appellant. The record shows that the respondent has employed a detective, or detectives, and is expending large sums of money in defending the suit and prosecuting his cross-complaint; and where, as in this case, the marriage is admitted by both parties, and the wife is shown to be without means to prosecute or defend her case, it is the duty of the court to make her a reasonable allowance under all the facts and circumstances of the case. And this should be done regardless and without consideration of the merits. (Am. & Eng. Ency. of Law, 100.)

It was held in *Read v. Read*, 28 Utah, 297, 78 Pac. 675, that ultimate and absolute necessity is not the basis upon which courts proceed in granting alimony. Equity and good conscience constitute the basis of such orders.

The respondent states in his affidavit "that it is not necessary for this court to require him to pay any attorneys' fees to the attorneys for the said plaintiff to keep them actively engaged in the prosecution of the above-entitled suit,

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or that the plaintiff is in need of any funds from this affiant to keep her said attorneys actively engaged in her interests.''' He nowhere says or shows that she has ample funds with which to pay her attorneys.

Counsel for respondent cites and relies upon *Sharon v. Sharon*, 84 Cal. 424, 23 Pac. 1100. In that case the marriage was denied, and it was finally decided therein that no marriage did in fact exist. That case is not in point here, as both parties to this action admit the marriage.

It is therefore ordered that respondent pay to the clerk of the district court of Shoshone county \$1,500 attorneys' fees on this appeal, within five days from the date of the service of this order, or a copy thereof, on the defendant or his attorneys of record, which sum the clerk shall pay over to her said attorneys of record for her use and benefit, and take their proper receipts therefor.

Ailshie, J., concurs.

STOCKSLAGER, C. J., Concurring in Part and Dissenting in Part.—I cannot concur in the conclusion reached by my associates that the order refusing to grant a change of venue should be reversed. In my view of the case the constitution and statute furnish ample protection to the litigant who believes he cannot have a fair and impartial trial by reason of the bias and prejudice of the presiding judge. It seems useless to say that the whole theory of the law is that no judge or juror should be permitted to sit in judgment wherein he may entertain bias or prejudice against any litigant, either civil or criminal; and it would indeed be an unusual condition if the litigant was without a remedy in the trial courts where it is shown that by reason of the bias and prejudice of the presiding judge he could not have a fair and impartial trial. This theory of the law has been handed down to us from our earliest law-writers, and is founded on the principle that all are equal before the law. I think the framers of our constitution solved the problem

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that had led to much expensive and unsatisfactory litigation growing out of the question of a change of venue based on the bias or prejudice of the judge by the enactment of section 12, article 5 of our constitution. It reads: "Every judge of the district shall reside in the district for which he is elected. A judge of any district court may hold a district court in any county at the request of the judge of the district court thereof, and upon the request of the governor, it shall be his duty to do so; but a cause in the district court may be tried by a judge *pro tempore*, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, and sworn to try the cause." It will be observed by this wise provision of our constitution that litigants are provided with two remedies to avoid the expense and delay of changing the venue on account of the bias and prejudice of the presiding judge. It is well known to all lawyers and to litigants who have had the experience of following a case from one county to another for trial that such changes are fraught with many difficulties, and carry with them a large bill of expense that can be avoided by a trial in the county where the parties litigant and their witnesses usually reside. I think it was to overcome this difficulty and expense that prompted the enactment of the above provision of our constitution. It has been the usual practice of our district courts since the adoption of our constitution to follow section 12, article 5, where it was apparent that the presiding judge was for any reason disqualified to preside at the hearing of any term or trial. It is not enough to say that the judge might decline to call another district judge, in case an effort were made to disqualify him; the provision is that, upon the request of the governor, it is the duty of any district judge to hold a term of court in another district in the state, and if the disqualified judge, or the judge called upon by the governor, declines to obey the provisions of the constitution, I am satisfied that upon a proper showing this court would make the necessary order for the enforcement of the request or order of the governor.

Points Decided.

It is shown in this case that the application was for a change of venue and not a request for the presiding judge to call in another district judge of the state to hold a term for him, nor a request for the selection of some member of the bar possessing the necessary qualifications to try and determine the case, either of which, under the provisions of section 12, article 5 of the constitution could have been done. For the reason that no such request or application was made. I think the order of the lower court refusing to change the venue should be sustained.

In my view it is unnecessary for me to pass upon the merits of the application. If it were one to call in another judge *pro tempore*, it would present a different situation. I should think the learned trial judge would hesitate to try a case of the importance and magnitude of the one at bar, where the plaintiff and all of her attorneys file affidavits stating that owing to his bias and prejudice a fair trial could not be had in his court, even though in his own mind and heart he is satisfied that such charge is without foundation in fact.

(July 10, 1906.)

STATE. Respondent, v. S. W. COTTEREL et al., Appellants.

[86 Pac. 527.]

JOINT INFORMATION—GRAND LARCENY—SEPARATE VERDICTS—JURISDICTION—ADJOURNMENT OF TERMS—JUDICIAL KNOWLEDGE—INSTRUCTIONS.

1. Where two defendants are jointly informed against and tried together for grand larceny, and the jury, under the instructions of the court, bring in a separate verdict against each, finding them guilty as charged in the information, and entitle each of the verdicts as though there were but a single defendant in the case, but name each of the defendants in the title. *Held*, that such verdicts

Points Decided.

are not void for uncertainty, and the fact that said verdicts were so entitled could not and did not prejudice the defendants.

2. Where the jurisdiction of the court is attacked on the ground that the term of court at which certain defendants were sentenced had elapsed before the sentence was pronounced by reason of the fact that the term in an adjoining county (under the settings of the terms by the judge) was to begin on the day that the court adjourned its term, and the record fails to show whether such term in the latter county had been adjourned prior to the adjournment of the term in the county where the defendants were convicted, the presumption will be that the court acted legally in the matter and had jurisdiction to pronounce and enter judgment.

3. This court cannot take judicial notice of the adjournment of the terms of the district courts. Such facts may be presented, as other facts are presented, on appeal.

4. Where it is alleged in the information that the ownership of the stolen property is in one person, and on the trial another person testifies that he owns a half interest in such property, and thereafter the former is recalled and explains the ownership of each, and the question of ownership is fairly submitted to the jury upon the evidence, and by an instruction given by the court. *Held*, that such instruction was properly given.

5. Where it is alleged in the information that the stolen property is owned by a certain person and the evidence shows that such person only has a half interest therein, such variance is not fatal, and does not entitle the defendant to an acquittal.

6. Where the court fairly covers every point in the case by instructions given on its own motion, it is not error to refuse to give instructions requested by counsel for the defendant covering the same point and questions.

7. *Held*, that under the evidence and affidavits of newly discovered evidence and errors assigned in admitting and rejecting evidence, the court did not err in denying a new trial.

(Syllabus by the court.)

APPEAL from the District Court of the Fifth Judicial District for Bannock County. Hon. Alfred Budge, Judge.

The defendants were convicted of grand larceny and sentenced to a term of eighteen months' imprisonment. *Affirmed*.

Argument for Respondent.

S. C. Winters and Hawley, Puckett & Hawley, for Appellants.

The test as to whether a verdict is sufficiently clear as to its import is, whether a conviction thereof could be successfully pleaded in bar of another prosecution for the same offense. (*Chambers v. People*, 4 Scam. 351; *Bland v. State*, 4 Tex. App. 15; *People v. Ah Ye*, 31 Cal. 452.)

The term of a district court in one county in a district cannot continue beyond the commencement of a term in another county in the same district. (*Cooper v. American Cen. Ins. Co.*, 3 Colo. 318; *Gregg v. Cook*, Peck (7 Tenn.), 82; *Grable v. State*, 2 Greene (Iowa), 559.)

The ownership must be proved as alleged, and it had not so been proved. (*People v. Bogart*, 36 Cal. 245.)

Our practice forbids, in a criminal cause, a summing up of the evidence by the court, or any statement of the evidence that might prejudice the jury. While subdivision 6 of section 7855, Revised Statutes, says the judge may state the testimony and declare the law, it especially prohibits him from charging as to facts, and such an instruction as No. 7 is in effect an instruction as to facts. (*People v. Barry*, 31 Cal. 357; *People v. Christenson*, 85 Cal. 568, 24 Pac. 888; *People v. Casey*, 65 Cal. 260, 3 Pac. 874; *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228; *People v. Kindlegerger*, 100 Cal. 367, 34 Pac. 852; *People v. Murray*, 86 Cal. 31, 24 Pac. 802; *People v. Matthia*, 135 Cal. 442, 67 Pac. 694.)

J. J. Guheen, Attorney General, Geo. E. Gray, County Attorney, and Standrod & Terrell, for Respondent.

Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right. (*State v. Ellington*, 4 Idaho, 529, 43 Pac. 61; *In re Dowling*, 4 Idaho, 715, 43 Pac.

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871; *State v. Larkins*, 5 Idaho, 200, 47 Pac. 949; *In re Marshall*, 6 Idaho, 516, 56 Pac. 470; *Territory v. Anderson*, 2 Idaho, 573, 21 Pac. 417; *State v. Preston*, 4 Idaho, 215, 38 Pac. 694; *State v. Reed*, 3 Idaho, 754, 35 Pac. 706; *State v. Clark*, 4 Idaho, 7, 35 Pac. 710.)

A verdict is to have a reasonable intendment, and is to receive a reasonable construction, and must not be avoided except from necessity. (Clark's Criminal Procedure, p. 486. and notes; *Polson v. State*, 137 Ind. 519, 35 N. E. 907; *Chambers v. Butcher*, 82 Ind. 508; *Daniels v. McGinniss*, 97 Ind. 549; *People v. Ah Kim*, 34 Cal. 189; *People v. Purdue*, 49 Cal. 425; *People v. McCarty*, 48 Cal. 557; *Hroneck v. People*, 134 Ill. 139, 23 Am. St. Rep. 652, 24 N. E. 861, 8 L. R. A. 837; *People v. Whitney*, 64 Cal. 211, 27 Pac. 1104; *People v. West*, 73 Cal. 345, 14 Pac. 848.)

Where two are tried jointly for robbery, the jury may return at the same time two separate verdicts. (*Cruce v. State*, 59 Ga. 83.)

It must be presumed that what was done by the court below was properly and legally done. Error is not to be presumed, but when alleged it must be affirmatively shown. (*Talbert v. Hopper*, 42 Cal. 397; *People v. Ah Ying*, 42 Cal. 18; *State v. Montgomery*, 8 Kan. 351; *State v. Palmer*, 40 Kan. 474, 20 Pac. 270; *State v. Rogers*, 56 Kan. 362, 43 Pac. 256.) Even if the evidence had shown that the son of the prosecuting witness had an interest in the horse in question, there would not be a variance that would fatally affect the judgment in this case. (*State v. Ireland*, 9 Idaho, 686, 75 Pac. 257; *State v. Rooke*, 10 Idaho, 388-404, 79 Pac. 82; *State v. Rathbone*, 8 Idaho, 161, 67 Pac. 186.)

When the court trying the case fully and fairly instructs the jury in writing upon every question arising on the trial, it is not error to refuse instructions submitted by the defendant or prosecution. (*State v. Rooke*, 10 Idaho, 388, 79 Pac. 82; *People v. Barnard*, 2 Idaho, 193, 10 Pac. 30.)

Requested instructions already substantially given are properly refused. (*State v. Cushing*, 14 Wash. 527 45 Pac.

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145; *People v. Thiede*, 11 Utah, 241, 39 Pac. 837; *State v. Cushing*, 17 Wash. 544, 50 Pac. 512.)

Where full and accurate instructions are given, it is not error to reject charges asked, even though they are technically correct. (*People v. Chadwick*, 7 Utah, 134, 25 Pac. 737; *State v. Ward*, 19 Nev. 297, 10 Pac. 133; *People v. Ah Jake*, 91 Cal. 98, 27 Pac. 595.)

SULLIVAN, J.—The defendants in this action were informed against jointly, and tried together and convicted of grand larceny on the fifteenth day of September, 1905, for stealing a certain mare. The jury brought in two verdicts, which are as follows:

“State of Idaho, Plaintiff, v. S. H. Cotterel, Defendant.

VERDICT.

We, the jury in the above-entitled cause, find defendant guilty of grand larceny, as charged in the information.”

“In the District Court of the Fifth Judicial District of the State of Idaho, and for Bannock County.

State of Idaho, Plaintiff, v. S. W. Cotterel, Defendant.

VERDICT.

We, the jury in the above-entitled cause, find defendant guilty of grand larceny as charged in the information.”

Thereafter, and on November 1, 1905, the defendants were sentenced to serve a term of eighteen months in the state penitentiary. On the thirty-first day of October, 1905, the defendants moved for a discharge on the grounds that no judgment could be entered on the verdicts, for the reason that neither of said verdicts refer to the cause in which the defendants were tried, or in any wise connect said verdicts with the cause upon trial, or with the information against the defendants, and that each of said verdicts were void for uncertainty, which motion was overruled. A motion for a new trial was also overruled. The appeal is from the judgment.

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Several errors are specified, but the first considered is to the form of the verdicts. It is contended by counsel for appellant that the case tried was entitled, "State of Idaho v. S. H. Cotterel and S. W. Cotterel," and it will be observed from the form of the verdicts above quoted that in the title S. W. Cotterel is named as defendant in one and S. H. Cotterel in the other; and it is contended by counsel for appellants that each of said verdicts refer to some other cause than the one upon which the defendants are being tried. It would seem very peculiar if a jury sat and heard one case and rendered a verdict in another. That is what counsel says was done in this case. But we find in the record that the court very clearly advised the jury as to the different verdicts which they might find in the case. The defendants S. H. and S. W. Cotterel were the only defendants on trial. The jury entitled one verdict, "State v. S. H. Cotterel," and the other verdict was entitled, "S. W. Cotterel," in which verdicts they found each of the defendants guilty and each verdict was properly signed by their foreman. It certainly cannot be seriously contended that the jury did not intend to, and did not, find both of the defendants guilty of grand larceny as charged in the information. The fact that the jury entitled each verdict in the name of a separate defendant did not and could not prejudice the defendants. Section 8236, Revised Statutes, provides that: "Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right." There is no merit in this contention.

The next contention is that the court did not have jurisdiction to pass judgment or sentence upon the defendants. It is contended that the defendants were convicted at the September, 1905, term of the district court of Bannock county, and that said term expired by limitation of law on September 19th, and that after 12 o'clock P. M., of said nineteenth day of September, an order was made adjourn-

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ing said term of court until the thirtieth day of October, 1905. That a term of court had been set theretofore for Bear Lake county in said judicial district, to begin on September 19, 1905, at 10 o'clock A. M. of that day, and that said order had not been set aside, or that said court had not been adjourned. That after the Bear Lake term mentioned had been held, the court reconvened in Bannock county on said thirtieth day of October, and the defendants were brought up for sentence on the verdict of September 15th, and that sentence was actually passed on November 1st. There is nothing in the record to support the contention that the term of the district court in which the case was tried was adjourned after 12 o'clock of the nineteenth day of September, 1905, and there is nothing in the record to show that the Bear Lake term had not been adjourned over that day. We cannot presume that the court would violate the statute. Section 3832, Revised Statutes, is as follows: "The court may adjourn from time to time during the term, and may, when the public convenience requires, adjourn the term over the time fixed by law for the commencement of another term in the same district."

It was said in *Talbert v. Hopper*, 42 Cal. 397, as follows: "There is nothing in the record before this court to show that the terms and conditions of this act (of the legislature) have not been fully answered, and in the absence of such showing in the record, it must be presumed that what was done by the court below was properly and legally done. Error is not to be presumed, but when alleged it must be affirmatively shown." The "act" referred to by the court in that case corresponds substantially to said section 3832. (See, also, *People v. Ah Ying*, 42 Cal. 18; *State v. Montgomery*, 8 Kan. 351; *State v. Palmer*, 40 Kan. 474, 20 Pac. 270; *State v. Rogers*, 56 Kan. 362, 43 Pac. 256.)

In *Baker v. Knott*, 3 Idaho, 700, 35 Pac. 172, this court held that where the record failed to show the date of the adjournment of a term of the district court, at which an order was made vacating a judgment, laches will not be presumed,

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and that this court cannot take judicial notice of the adjournment of terms of the district courts. That being true those matters must be brought to this court by bill of exceptions, or in some legal manner, before they can be considered on appeal.

Counsel also contends that there was error in giving instruction No. 4a, which instruction is as follows: "As to the ownership of the mare described in the information the jury, in order to convict, would have to find that the mare, at the time she was taken by the defendants, was the property of George E. Hellewell. You have heard the testimony of the witnesses George E. Hellewell, and his son, in this respect. You have heard the witness George E. Hellewell state what the arrangement was between him and his son with reference to the horses, which in effect was that his son should gather the horses of the quarter circle 76 brand, and that when the same were gathered and sold that his son should have the one-half of the proceeds therefrom. Now, if this were the case, such an agreement with his son would not constitute any ownership in the son until the horses were gathered, and if you should find that the horses were taken before they were gathered or before young Hellewell had done anything with reference to carrying out the agreement between him and his father, then there would be no ownership in the property of the mare taken except that of George E. Hellewell."

It is alleged in the information that the ownership of the mare stolen was in G. E. Hellewell. Hellewell was called as the first witness for the prosecution, and was asked no question in regard to the ownership of the mare. He testified, however, that his son had an interest in her. The son, James Hellewell, was placed upon the stand and testified that he was part owner of these horses; that he had a half interest in them. G. E. Hellewell was recalled by the prosecution and testified as to the interest his son had in the horses, and testified as follows: "The arrangements between me and my son were these: Some time about ten days before the time of the hearing of this cause, we were thinking of gathering

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the horses and disposing of all of them; I was busy and could not do the riding myself, and me and my wife talked about it first, and he had been doing quite a bit of riding, and we thought it would encourage him to give him an interest in what he was doing, and we concluded that we would give him half of what he could gather of these horses, and we would sell them and he could have half of it for gathering them. Up to the time of the taking of these horses there had been nothing done toward gathering them; I had gathered none and disposed of none up to that time. He has done, you might say, all of the riding before this time. I had been in the use of this brand for fourteen or fifteen years."

The instruction above quoted went to the ownership of the stolen mare, and was properly presented to the jury and fairly covered the evidence upon that proposition. Under that instruction the jury had to find in whom the ownership of the stolen property was at the time it was taken, and the instruction given was a correct statement of the law as applied to the evidence in this case. And even if the father only owned a half interest in the mare, the variance between the allegation in the information that he owned her, and with the evidence in the case that he only owned a half interest in her, would not be such a variance as would entitle the defendants to an acquittal. His owning a half interest and not a whole would not be a variance sufficient to fatally affect the judgment in the case. (*State v. Ireland*, 9 Idaho, 686, 75 Pac. 257; *State v. Rooke*, 10 Idaho, 388-404, 79 Pac. 82; *State v. Rathbone*, 8 Idaho, 161, 67 Pac. 186.)

There were ten instructions offered by the defendants which the court refused to give. Upon a careful review of the general instructions given by the court, we find that they fairly cover every point contained in the instructions tendered by the defendants and refused by the trial court. For that reason the court did not err in refusing to give them.

This court held in *State v. Rooke*, 10 Idaho, 388, 79 Pac. 82, that "where the court trying the case fully and fairly instructs the jury in writing upon every question arising on

Points Decided.

the trial, it is not error to refuse instructions submitted by the defendants covering the same ground." (See, also, *People v. Barnard*, 2 Idaho, 193, 10 Pac. 30.)

A motion for a new trial was made and is based largely on the insufficiency of the evidence to justify the verdict, and some alleged errors in rejecting or admitting certain evidence offered and affidavits of newly discovered evidence. We have gone over the evidence and affidavits filed on motion for a new trial very carefully, and we are unable to say that the court committed any error in denying a new trial; and, in fact, it is clear to us that there is no error in the record. The judgment must be affirmed, and it is so ordered.

Stockslager, C. J., concurs.

Ailshie, J., took no part in the decision.

(September 1, 1906.)

C. L. HEITMAN, Plaintiff, v. F. R. GOODING, Governor,
Defendant.

[86 Pac. 785.]

CONSTITUTIONAL LAW—APPORTIONMENT OF MEMBERS OF LEGISLATURE
—INTENT OF LEGISLATURE—CREATION OF NEW COUNTIES—ACT
CREATING INVALID.

1. The legislature undertook to create the counties of Lewis and Clark out of Kootenai county, including in said Lewis and Clark counties the entire area included in Kootenai county, and thereafter passed an apportionment bill which was approved on the seventh day of March, 1905, whereby the said counties of Lewis and Clark were each given one senator and two representatives, and each of the other counties of the state one senator and from one to five representatives. Thereafter the said act creating Lewis and Clark counties was held unconstitutional and void. *Held*, that as the legislative intent was to give each county one senator and representatives according to the number of votes cast at the last

Argument for Plaintiff.

preceding election, Kootenai county was entitled to one senator and four representatives.

2. Said act of apportionment held valid and constitutional, except wherein it awarded two senators to Lewis and Clark counties. (Syllabus by the court.)

ORIGINAL action to test the constitutionality of the apportionment act, approved March 7, 1905. *Act held constitutional.*

Ezra R. Whitla and Edwin McBee, for Plaintiff.

Both the spirit and the letter of the constitution is to give the different counties representation according to their population, and to give equal representation in the legislature to all counties according to their voting strength, and the court should go out of its way to see that the intention and spirit of the constitution is put into execution, and will never deny just representation, unless the same is unavoidable. (*Deny v. State*, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; *State v. Van Camp*, 36 Neb. 9, 91, 54 N. W. 113.)

A construction should not be placed on the apportionment bill of 1905 which will disfranchise the population of Kootenai county, in a degree at least, from voting for the full quota of representatives for the state legislature which she is entitled to by reason of her population, and which the legislature has said entitled her to six members of the legislature for 1907.

"The legislature is prohibited from passing an apportionment act which does not give substantially just and equal representation to the people of each county, based upon either the voting or entire population, or upon some other fair basis." (*Ballentine v. Willey*, 3 Idaho, 496, 95 Am. St. Rep. 17, 31 Pac. 994.)

What the petitioner considers the only question in this case is, as to whether or not the apportionment bill of 1905 can be made to apply to Kootenai county, when it was erroneously designated therein as Lewis and Clark counties.

Argument for Defendant.

An erroneous naming of a county will not defeat the bill, especially as it is so apparent therefrom that Kootenai was the real county intended. We have alleged that it was erroneously designated as Lewis and Clark counties, when it was in reality Kootenai county, and this is admitted by the answer. The territory the legislature intended will govern, even though it is not named at all. (*Shellabarger v. Williamson*, 50 Kan. 138, 32 Pac. 132; *Sutherland on Statutory Construction*, sec. 366.)

Nowhere in the constitution is there any provision which prohibits the legislature from dividing a county and making two senatorial districts wholly within a single county when that county has sufficient territory and population to warrant their doing so.

The legislature has given to the territory and population comprising Kootenai county the representation now asked for; and the same is a fair and just apportionment; and to hold the act invalid would be to deprive Kootenai county of her equal representation in the legislature, and to give to others not having such a large territory or population more representation than they are entitled to.

J. J. Guheen, Attorney General, Edwin Snow and Philip R. Hindman, for Defendant.

Section 4 of article 3 of the constitution provides: "The members of the first legislature shall be apportioned to the several legislative districts of the state in proportion to the number of votes polled at the last general election for delegates to Congress and thereafter to be apportioned as may be provided by law."

It will be noted that the apportionment herein provided for, to be based on voting strength, was only to apply to the first legislature, leaving to the legislature itself the power to make future apportionments as it saw fit. This also appears from article 19 of the constitution, which prescribes the apportionment "until otherwise provided by law." It will be

Argument for Defendant.

seen that the constitution contains no provisions requiring the legislature to make future apportionments on the basis of population or voting strength, or any other particular basis, but left the legislature free to regulate the matter to suit itself, so long as the apportionment was fair and equitable.

The senatorial apportionment of the act of 1905 shows on its face that it was not based on either population or voting strength. This view is strengthened by the language of section 2, which provides that, "Any new county which may hereafter be created shall constitute a senatorial district, and shall elect one senator, and shall elect one representative," showing plainly their intention to keep the counties on an equal footing in the senate.

The legislature was dealing with Lewis and Clark counties *as such*; as two separate and independent counties; not with Kootenai county; not with the people of Kootenai county.

An apportionment bill can only be regarded as a complete, inseparable whole, wherein the different parts "are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently." (*Warren v. Charlestown*, 2 Gray, 84.)

The legislature gave Lewis and Clark counties each one senator *simply because it thought it had created two new counties*, and was merely following out its policy of giving one senator to each county, regardless of size.

"This court cannot legislate by way of substitution." (*Commonwealth v. Potts*, 79 Pa. St. 164.) That is what this court was asked to do and refused to do in the case of *Balentine v. Willey*; that is what it is asked to do now. It is asked to eliminate from the act of 1905 the two counties of Lewis and Clark, and to substitute therefor the county of Kootenai, giving it certain representation to which petitioner

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alleges it to be entitled. If that is not judicial legislation, what is it?

Referring again to *Ballentine v. Willey*, *supra*, this court, at page 507, says: "In the case at bar the apportionment act was to all intents and purposes declared unconstitutional by the decision in the Alta-Lincoln case. The plaintiff herein is claiming rights under a law already declared unconstitutional"—every word of which could be applied with equal force to the case at bar.

SULLIVAN, J.—This is an original proceeding brought in this court to determine the constitutionality of the apportionment act of the legislature, apportioning state representatives and senators to the various counties of the state, approved March 7, 1905. (See Sess. Laws 1905, p. 76.)

It appears that the legislature attempted to establish and create the counties of Lewis and Clark out of the territory included within Kootenai county and passed an act to that effect, approved February 29, 1905. By that act, the legislature undertook to create Lewis county out of the northerly half and Clark county out of the southerly half of said county, and under said apportionment act, the said counties of Lewis and Clark were given one senator and two representatives each. Thereafter this court in the case of *McDonald v. Doust*, 11 Idaho, 14, 81 Pac. 60, 69 L. R. A. 220, held said act of the legislature attempting to create said Lewis and Clark counties unconstitutional and void, thereby sustaining the integrity of Kootenai county as originally created.

The act creating the counties of Lewis and Clark having thus been held unconstitutional, the questions arise as to whether Kootenai county is entitled to two senators and four representatives, that being the number apportioned to said Lewis and Clark counties, and whether if said Kootenai county is not entitled to two senators and four representatives, what number of representatives and senators it is entitled to, and whether, by reason of said act (attempting to create said Lewis and Clark counties) having been held void.

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said apportionment act is for that reason unconstitutional and void.

Counsel for plaintiff first contended that said act is constitutional and that said Kootenai county is entitled to two senators and four representatives. That as said Lewis and Clark counties were created from the identical territory included within the boundaries of Kootenai county, the legislative intent was to give that territory and population within it two senators and four representatives. We cannot wholly agree with that contention. It is clear to us from the said legislative apportionment act that it was the intention of the legislature to give to each county one senator, as was done by said act, and that representatives were apportioned to the several counties according to the vote cast at the last preceding state election for one of the state officers. That being true, if the unconstitutional act creating Lewis and Clark counties had not been passed, Kootenai county would have been given but one senator. We, therefore, hold that Kootenai county is entitled to but one senator.

It is very apparent that it was the intention of the legislature to give to each county in the state but one senator, and it may have been that the legislature in apportioning representatives to the several counties gave to each county one representative for a certain number of votes cast at the last preceding election, and one also for every major fraction of such number. In case said unconstitutional act had not been passed, Kootenai county as a whole may have been entitled to five representatives instead of four, by reason of its having a major fraction of the number which was used as the basis of such apportionment, but we have nothing before us showing that it has such major fraction. We, therefore, hold that Kootenai county is entitled to four representatives and no more.

It is contended that under the decision of this court in *Ballantine v. Willey*, 3 Idaho, 496, 95 Am. St. Rep. 17, 31 Pac. 994, that the apportionment act under consideration is unconstitutional and void. We cannot agree with that con-

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tention as the facts in that case were very different from the facts in the case at bar. In that case Logan and Alturas counties were abolished and the counties of Alta and Lincoln created; and while it is true that said Alta and Lincoln counties contained all of the territory included within Alturas and Logan counties, Alta county contained a larger area and population than Alturas county contained, and Lincoln county a smaller area and population than Logan county. That being true, the act creating Alta and Lincoln counties having been held by this court unconstitutional, the number of representatives apportioned to Alta county would not apply to Alturas county, because Alta county included a larger territory and population than was included in Alturas county, and the said Lincoln county contained less territory and population than was included in Logan county.

It will therefore be observed that the legislature would not have given Alturas county the same representation that it did Alta county, and would have given Logan county a larger representation than it gave Lincoln county. In that case it was apparent that the legislature would not have passed said apportionment act giving the same representation to Alturas county that it gave to Alta county or the same to Logan county that it gave to Lincoln. While in the case at bar the representation to Lewis and Clark counties, aside from one senator, would, in all probability, have been just the same as was given to Lewis and Clark counties, as identically the same territory and population were included in Lewis and Clark counties as are included in Kootenai county. We, therefore, hold said apportionment act valid, with the exception that Kootenai county is entitled to only one senator and four representatives. This construction of the act under consideration will carry out the intent of the legislature in giving to the territory of Kootenai county and the electors thereof substantially equal representation with the other counties of the state, and will not disfranchise any considerable number of the electors of the state or deprive any county of its just representation in the legislature. (*State v. Van Camp*,

Points Decided.

36 Neb. 9, 91, 54 N. W. 113; Sutherland on Statutory Construction, sec. 366.)

To adopt the contention of counsel for plaintiff in case the legislature had constitutionally created other new counties, and by said apportionment act had given them senatorial and legislative representation, then for this court to hold said apportionment act unconstitutional, would have deprived such new county of all representation whatever, except such as is given it by the constitution, to wit, one representative. When the intent of the legislature is as obvious as it is in the case at bar, to wit, that the people and territory included within the boundaries of Kootenai county should have four representatives, and it is also clear from said act that it was the intention to award to each county one senator, the court is fully justified in construing the act to that effect and holding that Kootenai county is entitled to one senator and four representatives. The court, therefore, concludes that said apportionment act is valid and that Kootenai county is entitled to one senator and four representatives, and no more. and that the election proclamation of the governor should carry out said apportionment act as herein construed, and it is so held. No costs are awarded in this case.

Stockslager, C. J., and Ailshie, J., concur.

(September 4, 1906.)

FRANK W. HUNT, Appellant, v. THE CAPITAL STATE BANK (a Corporation), Respondent. S. C. GODLOVE and S. A. HINDMAN, Interveners.

[87 Pac. 1129.]

ESCROW AGREEMENT FOR THE PURCHASE OF A MINING CLAIM—PAYMENT OF PURCHASE PRICE—EXPENSE OF PROCURING PATENT.

1. Where H. enters into an agreement with H. and G., whereby it is agreed that H. will pay \$7,100 for a certain mining claim, and pays in cash \$100 thereof, and agrees that the balance shall be

Argument for Appellant.

due February 3, 1905, and that H. will pay the expense for procuring a patent to said mining claim, and that time is of the essence of the contract, and that thereafter, on February 3, 1905, H. deposited the \$7,100 with the bank, as provided by the escrow agreement, with instructions to hold the same until the receiver's receipt for the patent of the mining claim has been issued, and thereafter the receiver's receipt is procured and filed with said bank by H. and G. *Held*, that the bank was justified in paying the money over to H. and G. after said receipt was so procured.

2. Where several writings constitute one contract, such writings must be construed together.

(Syllabus by the court.)

APPEAL from the District Court of the Third Judicial District for Ada County. Hon. George H. Stewart, Judge.

Action to recover money paid on an escrow agreement. Judgment for the respondents. *Affirmed*.

A. A. Fraser, for Appellant.

A proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer. (*Bank v. Hall*, 101 U. S. 51, 25 L. ed. 822; *Tilley v. County of Cook*, 103 U. S. 161, 26 L. ed. 374.)

There must be strict compliance with the terms of the option in order to perfect the rights of the one holding it to enforce the contract. (*Harding v. Gibbs*, 125 Ill. 85, 8 Am. St. Rep. 345, 17 N. E. 60.)

The acceptance must be on the terms and within the time specified. (*Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Schiels v. Horbach*, 30 Neb. 536, 46 N. W. 629.)

A limitation of time for which a standing offer is to run is equivalent to the withdrawal of the offer at the end of the time named. (*Longworth v. Mitchell*, 26 Ohio St. 334.)

There was no acceptance of the second proposition varying the terms of the option made by the plaintiff, by Godlove and Hindman, as required by sections 6007, 6009, Revised Statutes. (*Niles v. Hancock*, 140 Cal. 157, 73 Pac. 842; *New-*

Argument for Respondent.

lin v. Hoyt, 91 Minn. 409, 98 N. W. 323; *Platt v. Butcher*, 112 Cal. 634, 44 Pac. 1060.)

There was no consideration for the extension of time of the original option, and if there was an attempted extension of said option, it was void for failure of consideration, and not being in writing. (*Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695.)

Ira E. Barber, for Respondent.

The statute of frauds does not apply where a case has been performed in whole or in part. This court has frequently so declared. (*Deeds v. Stephens*, 8 Idaho, 514, 69 Pac. 534; *Barton v. Dunlap*, 8 Idaho, 82, 66 Pac. 832; *Francis v. Green*, 7 Idaho, 668, 65 Pac. 362.)

A unilateral writing, in the way of an offer, in case of performance becomes bilateral when the other party proceeds with performance and cannot be withdrawn. (*Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086; *Thurber v. Meeves*, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; *Beckwith v. Talbott*, 95 U. S. 289, 24 L. ed. 496.)

If such offer contemplates or permits acceptance of acts instead of a specific acceptance by words, such form of acceptance eliminates want of mutuality. (3 Page on Contracts, 1616; *Storm v. United States*, 94 U. S. 76, 24 L. ed. 42; *Welch v. Whelphley*, 62 Mich. 15, 4 Am. St. Rep. 810, 28 N. W. 744.)

Want of mutuality is no defense, even in action of specific performance, where the party not bound thereby has performed all the conditions of the contract and brought himself clearly within its terms. (*Bigler v. Baker*, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255. Quoted in *Rank v. Garvey*, 66 Neb. 767, 92 N. W. 1025, 99 N. W. 666.)

The contract was executory, and became mutual and binding the instant interveners proceeded with their efforts to procure receiver's receipt, and as an offer to purchase, could not then be withdrawn. (*Bowman v. Ayers*, 2 Idaho, 465,

Argument for Respondent.

21 Pac. 405; *McCallister v. Safely*, 65 Iowa, 719, 23 N. W. 139.)

The writing of February 3, 1905, deposited with the escrow holder became, upon acceptance of its conditions, merged into the contract between the parties, and the contract as thus merged and modified must be construed as a whole. (*Utley v. Donaldson*, 94 U. S. 29, 24 L. ed. 54; *Crane v. Kildorff*, 91 Ill. 567; *Brush-Swan etc. Co. v. Brush etc. Co.*, 41 Fed. 163; *Halsell v. Renfrow*, 14 Okla. 674, 78 Pac. 121; *Beckwith v. Talbott*, 95 U. S. 289, 24 L. ed. 496; *Ryan v. United States*, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913; *Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950; 2 Page on Contracts, 1116.)

The time for performance of a contract under seal may be extended by a subsequent oral contract. (3 Page on Contracts, 1905 ed., 1345; *McCreery v. Day*, 119 N. Y. 1-7, 16 Am. St. Rep. 793, 23 N. E. 198, 6 L. R. A. 503.)

The payment of the money to the trustee to the use and benefit of the interveners was an affirmance of the escrow agreement and option, and was paid for the manifest purpose of claiming on behalf of plaintiff all the benefits of the contract, was a waiver of nonperformance on part of grantors, if any, as to patenting, and an extension of time in which to patent. (*Buckeye M. & M. Co. v. Carlson*, 16 Colo. App. 446, 66 Pac. 168; *Flannery v. Rohermeyer*, 46 Conn. 558, 33 Am. Rep. 36; *Mehen v. Williams*, 2 Daly, 367.)

In this case the plaintiff made an election to pay on the day. This amounts to waiver and creates an estoppel against him. (3 Elliott on Evidence, 2073; *Lee v. Templeton*, 73 Ind. 315; *Steinbach v. Relief Ins. Co.*, 77 N. Y. 498, 33 Am. Rep. 655; *Scholey v. Rew*, 23 Wall. (U. S.) 331, 23 L. ed. 99.)

Where there is a mutual modification of the contract, and one party concludes thereafter to stand on the letter of the contract, he must notify the other party. (*Eaves v. Cherokee Iron Co.*, 73 Ga. 459; *Watkinson v. Elsworth*, 27 Conn. 209.)

Consent on the part of the interveners to allow the money

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to remain in the hands of the escrow holder, pending the issuance of receiver's receipt, was no waiver of their rights to it. (*Colorado S. L. & M. Co. v. Ponick*, 16 Colo. App. 478, 66 Pac. 458.)

Johnson & Johnson, for Interveners.

Performance or part performance takes a contract out of the statute of frauds. (Rev. Stats., sec. 6008; *Bates v. Babcock*, 95 Cal. 488, 29 Am. St. Rep. 133, 30 Pac. 605, 16 L. R. A. 745; *Ryan v. Tomlinson*, 39 Cal. 639; *McCarthy v. Pope*, 52 Cal. 561; *Coffin v. Bradbury*, 3 Idaho, 778, 95 Am. St. Rep. 37, 35 Pac. 715; *Reedy v. Smith*, 42 Cal. 250.)

The objection of want of mutuality in a contract is not available where both parties act upon the contract. (*Bloom v. Hazzard*, 104 Cal. 312, 37 Pac. 1037; *Bayne v. Wiggins*, 139 U. S. 215, 35 L. ed. 144, 11 Sup. Ct. Rep. 521; *Ryan v. United States*, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913.)

SULLIVAN, J.—This action was brought by the appellant to recover from the defendant bank \$7,000, together with interest thereon, the principal sum of which had been deposited in the said bank for the benefit and use of the interveners, upon an agreement or option for the purchase of the Buffalo quartz mining claim, situated in the Thunder Mountain mining district, Idaho county.

On the third day of November, 1904, the appellant and the interveners entered into the following agreement:

“Warrens, Idaho, November 3, 1904.

In consideration of one hundred dollars, the receipt of which is hereby acknowledged, we, the undersigned, owners of the Buffalo Quartz Mining Claim, situated on Thunder Mountain, Idaho County, Idaho, hereby agree to sell said claim to F. W. Hunt of Boise, Idaho, for a price of seven thousand (\$7,000.00) dollars, to be paid to our order at the Capital State Bank, at Boise, Idaho, on or before the 3rd

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day of February, 1905, and that we will execute and deliver deeds for said property at the said bank to said F. W. Hunt, and will agree that the title to said property shall be good, and will proceed without delay to the survey and patent of said Buffalo claim, the said F. W. Hunt or assigns to pay the costs of patenting excepting the preliminary survey.

(Signed) S. A. HINDMAN,
S. C. GODLOVE."

Thereafter, on the second day of December, 1904, a deed to said mining claim was placed in escrow with the defendant bank, to be held and to be delivered to the appellant according to the following instructions, deposited with the bank at the time of depositing said deed, to wit:

"Placed in escrow in the hands of the Capital State Bank to be delivered to F. W. Hunt, if he shall make all the payments as below specified; otherwise, to be subject to the order of S. C. Godlove and S. A. Hindman of Warrens, Idaho.

"AGREEMENT.

Consideration	\$7,100.00
Cash paid	100.00
Due Feb. 3d, 1905.....	\$7,000.00
Due Feb. 3, 1905, expense incurred in procuring patent.	

"There will be no obligation on the part of S. C. Godlove and S. A. Hindman to deliver above-described deed unless payments are made as above, time being the essence of the agreement."

On the third day of February, 1905, appellant paid into said bank \$7,000 to the credit of the interveners, and at the same time delivered to the bank the following writing, to wit:

"Agreement dated November 3, 1904, between S. C. Godlove, S. A. Hindman to F. W. Hunt. Filed at request of F. W. Hunt, February 3, 1905, to accompany escrow agreement between above parties dated December 2, 1904. To the Capital State Bank of Idaho, Ltd. Payment of \$7,000.00 being made this 3d day of February, 1905, to S. C. Godlove and S. A. Hindman by F. W. Hunt, in accordance with the terms

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of said escrow agreement and said agreement of November 3d, 1904, you are hereby instructed to hold said amount until Receiver's receipt in application for patent of said Buffalo claim has been issued.

F. W. HUNT."

Thereafter the interveners proceeded with their application for a patent, and on the twenty-first day of October, 1905, the intervener Hindman presented the receiver's final receipt for the sum of \$105, that being in full payment for the area of land embraced in said Buffalo lode mining claim.

On the twenty-seventh day of October, 1905, the appellant delivered to the bank the following notice in writing:

"Boise, Idaho, October 27th, 1905.

The Capital State Bank, Boise, Idaho:

Gentlemen—I hereby notify you not to deliver or pay over to Godlove & Hindman, or either of them, or their assigns, the seven thousand dollars which you hold in escrow for the purchase of the Buffalo Quartz Claim in Thunder Mountain Mining District, Idaho County, State of Idaho, as the terms of their contract with me were not carried out.

Very respectfully,

F. W. HUNT."

It appears from the testimony of the appellant, who testified at the trial of the case, that if he failed to make the payment of \$7,000 on the 3d of February, 1905, the option of purchase expired; that he saw one of the interveners about getting an extension for the payment of that sum, and was informed that the affair was entirely in the other intervener's hands, and whatever he did in regard to the matter would be satisfactory to him; that he failed to get an extension of time; that the option would expire on the 3d of February if the payment was not made, having failed to get an extension of time. The appellant then testified as follows: "I went to the bank on the 3d of February and I paid this \$7,000. At that time the proceedings toward procuring a patent had not been completed. That was the reason that I asked for an extension of time. When I first got the option, we talked over

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the patent proceedings, and Mr. Hindman told me he was going right into Roosevelt to make the preliminary survey of the 'Buffalo,' and that it would take him only a few days. That he would come right out with his application for patent; it would be well under way and perhaps completed by the third day of February, 1905. . . . I knew this proceeding had not been completed at this time."

It is apparent from the testimony in the record that the proceedings for a patent were not completed as early as the parties had anticipated, and that the appellant desired the bank to hold the money until the final receiver's receipt was issued for the land included in the Buffalo lode claim, thus making sure of a perfect title thereto. Apparently, the interveners were satisfied to leave the money in the hands of the bank, as requested by the appellant. They thereafter procured said final receipt and deposited it with the bank, and the bank thereafter turned them over the \$7,000.

There is some conflict in the testimony of the appellant and of the cashier of the bank as to conversations had between them. The trial court evidently concluded to accept the evidence of the cashier as true, and made findings of fact, conclusions of law and entered judgment in favor of the bank and the interveners. There appears to be a substantial conflict in the evidence, and where that appears, the appellate court will not disturb the judgment of a trial court.

The main contention of counsel for appellant is, that said option expired on the third day of February, 1905, as the payment of the said \$7,000 on that day was not an absolute payment. From all of the evidence in the case, it is clear to us that it was an absolute payment of the \$7,000. The intervenor, Hindman, testified on the trial that he received a letter from the appellant, in which the appellant notified him that he had made payment on the third day of February, 1905. The appellant testified that the expense of procuring the patent was not paid by him at the time of paying the \$7,000 because the expense for procuring the patent was not known at that time. He also testified that he told the cashier of the bank at the time he paid the \$7,000 that after the re-

ceiver's receipt for the Buffalo claim was obtained, he, the cashier, could pay it to Godlove and Hindman. That being true, the bank was fully justified in paying said \$7,000 over to the interveners, after the receiver's receipt was presented to its cashier.

It appears from the testimony that one of the interveners had a conversation with the appellant on the 19th of October, 1905, in which the former informed the appellant that he had received the final receiver's receipt, and at that time showed the same to the appellant, with an itemized account of the expenses or cost of procuring the patent; that the appellant looked them over and passed them back to the intervener and said, "It seems as though everything is all right." That at that time the appellant informed the intervener that he was going away and would like it if the interveners did not make a demand on the bank for the money before he returned; that the appellant also said that it took so much time to get the receiver's receipt that he thought there ought to be some concession made to him, but did not say just what he wanted. The intervener saw the appellant again on the following Monday or Tuesday, and told him that he wanted to go down to the bank and straighten the matter up; that appellant informed him that he would like to have a discount of ten per cent and the cost of the patent remitted; and the intervener replied that they had fulfilled their contract and were entitled to their money without any discount or concession of any kind. Thereafter he had another conversation with the appellant, and appellant offered to straighten the thing up and release the money in the bank if he would give him \$100 and the cost of the patent, and the intervener replied "that he could do that."

The cashier of the bank testified as a witness on behalf of the appellant, and testified that the final receiver's receipt was filed and deposited with him on the 21st or 22d of October, 1905, when one of the interveners came to the bank and produced the final receiver's receipt, and asked for a completion of the agreement in accordance with the escrow agreement. The cashier replied that "he would rather see the ap-

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pellant, and for them to come in together"; and shortly thereafter he saw the appellant and informed him that said intervenor was in the city, and had presented the receiver's receipt; that the cashier went and got the papers and said to the appellant that, "under the circumstances, he saw nothing to do but to comply with the agreement and pay the money"; that appellant agreed with him; that appellant said to the cashier, "that if the envelope (on which was written the escrow agreement) could just be lost some way, that might afford some relief"; that in a conversation with appellant he expressed a desire to get some allowance made on the part of the intervenor, in the nature of a concession, and he had about twelve conversations with appellant during a term of about two weeks in regard to the matter, and clearly indicated a desire to get some concessions from the intervenors and requested the cashier to defer the matter along from day to day; and the cashier did so, hoping that the matter would be amicably adjusted; that he thereafter submitted the matter to his attorney, who investigated the matter, and advised him to pay the money over to the intervenors, and the money was paid over. The witness further testified that he knew that appellant was trying to get some concessions for the intervenors, but when he found the money had been paid in accordance with the instructions, about the first remark he made to the cashier was as follows: "I could have had something over \$200." Thus intimating that he could have procured some concessions, if the payment had not been made at that time.

It is clear to me, from the foregoing, that the appellant considered the transaction closed and was endeavoring to get some concessions. It is contended by counsel for the appellant that the payment of the money on February 3d, with instructions not to pay it over until the receiver's final receipt was filed with the bank, was a change in the escrow. Conceding, for the sake of argument, that that was so, the consent of the intervenors to allow the money to remain in the hands of the escrow holder, pending the issuance of the receiver's receipt, was no waiver of their rights. However,

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as we view it, the money was absolutely paid on the third day of February, 1905. The writing of February 3d deposited in escrow became, upon acceptance of its conditions by the interveners, merged in the contracts between the parties, and the contracts thus merged and modified must be construed as a whole. (*Utley v. Donaldson*, 94 U. S. 29, 24 L. ed. 54.) All the writings connected with this transaction may be construed together as one contract. It is clear that the interveners consented to leave the money on deposit until the receiver's receipt was finally obtained. And thereafter said receipt was obtained and the money paid. The consent of the interveners to not withdraw the money until the receiver's receipt was obtained amounted to a contract between the parties that the sale was completed, and that the costs of procuring the patent would be paid when the amount was ascertained. The interveners fully carried out their part of the contract, and the appellant carried out his to the extent of paying the \$7,000, and was bound to pay the cost of procuring the patent when that amount was ascertained. The object of appellant in wanting the money to remain in the bank until the receiver's final receipt was obtained is apparent, and when such receipt was received, it is apparent that the appellant desired to get some concessions from the interveners. It was for that purpose that the appellant asked the bank to delay payment from day to day.

I think, under the facts of this case, the interveners are entitled to recover from the appellant the cost of procuring the patent to said mining claim. The judgment, therefore, must be affirmed, and it is so ordered, with costs in favor of the respondents.

Stockslager, C. J., and Ailshie, J., concur.

ON REHEARING.

(January 5, 1907.)

3. Where, under an agreement for purchase of a mining claim, H. agreed to pay the cost of procuring a patent to said mining claim, and H. and G. proceeded and procured the patent, and accepted

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the purchase price from the escrow holder, and declined to return the same to H. on his taking the position that they had not fulfilled their agreement. *Held*, that H. was entitled to his deed from the grantors and legally relieved from the payment of any further sum.

(Syllabus by the court.)

AILSHIE, J.—A rehearing was granted in this case on the question of the liability of appellant Hunt to pay the sum of \$439.65, the expenses incurred by the interveners in patenting the mining claims over which this litigation arose. After hearing the case reargued, and a further consideration thereof, we are satisfied that the original opinion should be modified to the extent of holding that the appellant is not liable for this expense of patent proceedings. Conceding that the agreement of February 3, 1905, was continued in force, we are still confronted with this proposition: Under the original contract the \$7,000, and also the expense of procuring a patent, was made payable at the same time and place; namely, at the Capital State Bank, Boise, Idaho, on February 3, 1905. Time was made the essence of the agreement. The payment of the \$7,000 was not a full payment of the sum due on February 3d, or upon the date to which that payment was extended. On the other hand, a receipt and acceptance by the grantors of the amount paid, and their refusal to return or surrender the same, entitled the appellant Hunt to the deed, and legally relieved him from the payment of any further sum. The interveners had the right to reject the payment until the same was made in full, including both the \$7,000 and the expense of patent proceedings. Under the conditions and circumstances surrounding this transaction, we do not think the grantors could accept a partial payment of a sum that it had been agreed should be paid at a given time and place, and still withhold the deed and compel the grantee to pay the balance before receiving the deed. It would be otherwise if these sums constituted separate installments or had been payable at different times. In that case the grantors might receive and accept one payment, and upon failure of the grantee to make any subsequent payment according to the terms of the escrow, declare the forfeiture

Points Decided.

provided by the agreement and still retain the deed. The former opinion of this court will be modified as above indicated, and the cause is hereby remanded to the trial court, with direction that the original decree entered herein be modified in accordance with the views herein expressed, to the effect that the interveners, Godlove and Hindman, be allowed to retain the money deposited by appellant with the respondent bank, and by the bank paid to them, and that the deed for the mining property mentioned and described be delivered to appellant, and that no judgment be entered against appellant for or on account of expenses incurred in procuring patent.

Appellant and interveners will each pay their own costs incurred on this appeal and the respondent bank's costs will be divided equally between appellant and interveners.

Stockslager, C. J., and Sullivan, J., concur.

(November 3, 1906.)

J. J. DONOVAN et al., Appellants, v. A. R. MILLER et al.,
Respondents.

[88 Pac. 82.]

ENJOINING AND RESTRAINING ENFORCEMENT OF JUDGMENT—NEG-
LIGENCE, MISTAKE AND UNSKILLFULNESS OF ATTORNEYS—NEGLECT
TO PLEAD DEFENSES—PERJURY—DISCOVERY OF—REASONABLE DIL-
IGENCE.

1. A court of equity will not grant an injunction to restrain the enforcement of a judgment at law on the grounds of want of consideration or that the contract sued on is against public policy, where the defendant, through negligence of his attorneys, fails to set up such defenses.

2. Where a defendant fails to interpose all of his defenses in the trial court and judgment goes against him, a court of equity will not restrain enforcement of such judgment on the ground of the failure or negligence of his attorneys to interpose such defenses.

3. Courts will not relieve against a judgment in an independent suit for mere mistakes at law.

Argument for Appellants.

4. The erroneous advice of an attorney is not such a mistake as will entitle a party to relief from a judgment.

5. A court of equity will not restrain the enforcement of a judgment at law on the ground of perjury or fraud in obtaining it, unless such fraud is extrinsic or collateral to the question examined and determined in the action.

(Syllabus by the court.)

APPEAL from the District Court of the First Judicial District for Kootenai County. Hon. Ralph T. Morgan, Judge.

Action to restrain the enforcement of a judgment at law. Judgment on demurrer for the defendants. *Affirmed*.

Charles L. Heitman, for Appellants.

It must be conceded, under the allegations of the complaint, taken as confessed by the demurrer, that the judgment which respondent Miller obtained against appellants, the enforcement and collection of which is sought to be permanently enjoined and to be vacated and set aside, was obtained by fraud on the part of respondent Miller.

A judgment is subject to attack by original bill for fraud, even after judgment in the appellate court. (*Kingsbury v. Buckner*, 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638.)

The complaint shows (1) that appellants had a cause of action and lost it; (2) that such loss occurred because they were prevented from presenting their defense, or having it properly considered, either through fraud, accident, or mistake, and other sufficient grounds justifying the interposition of equity; (3) that unless they secure relief in equity, they will be without adequate remedy. (*Little Rock Co. v. Well*, 61 Ark. 354, 54 Am. St. Rep. 216, and note, 33 S. W. 1057, 30 L. R. A. 560.)

In the case at bar appellants were prevented from presenting their defense by the mistake or the negligence of their attorneys. They were prevented from having their defense properly considered by the fraud and perjury on behalf of

Argument for Respondents.

respondent Miller. (*Erie R. R. Co. v. Ramsey*, 45 N. Y. 637; Story's Equity Jurisprudence, secs. 875, 884.)

Courts of law are not to be used by parties in perfecting, through the forms of law, the ruin of a party who has employed a negligent or unworthy attorney. (*People v. Mayor*, 11 Abb. Pr. 66.)

The attempt of appellants to make their defense proved unavailing through fraud, accident and mistake, which are sufficient grounds to induce the action of a court of equity. (*Burton v. Hynson*, 14 Ark. 32; *Parnell v. Hahn*, 61 Cal. 131; *Preston v. Ricketts*, 91 Mo. 320, 2 S. W. 793; *St. Louis v. Schulenberg etc. Co.*, 98 Mo. 613, 12 S. W. 248; *Curtis v. Cesne*, 1 Ohio, 432; *Winpenny v. Winpenny*, 92 Pa. St. 440; *Bias v. Vickers*, 27 W. Va. 456; *Hendrickson v. Hinkley*, 17 How. 443, 15 L. ed. 123.)

Edwin McBee, for Respondents.

"Courts of equity will only interfere to enjoin a judgment at law rendered against a party by reason of fraud or accident, unmixed with any fault or negligence of himself or his agents." (*Phelps v. Peabody*, 7 Cal. 50.)

An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of a party or counsel where, if the neglect were excusable, full relief might have been had on motion in the original action. (*Borland v. Thornton*, 12 Cal. 440.)

Where a party moves for a new trial and fails, he cannot, on the same facts, go into equity and enjoin the judgment rendered. (*Collins v. Butler*, 14 Cal. 223.)

A judgment cannot be attached on account of material of which a defendant might have availed himself in the original action, when there is no proof of fraud or surprise. (*Weir v. Vail*, 65 Cal. 466, 4 Pac. 422.) A judgment at law will be set aside on the ground of fraud only when the fraud was practiced in the act of obtaining the judgment, and the party against whom it was rendered and his counsel are free from

Argument for Respondents.

negligence. (*Zellerbach v. Allenberg*, 67 Cal. 296, 7 Pac. 908; *Ede v. Hazen*, 61 Cal. 360.)

“Perjured testimony procured by bribery on the part of the successful party is not ground for setting aside a decree, although there is a reasonable certainty that the result of a new trial would be different.” (*Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 971, 27 Pac. 537, 13 L. R. A. 336.)

A judgment will not be vacated for perjury where one of the defendants in an action on a promissory note falsely testified that he signed as surety only. (*McDougal v. Walling*, 21 Wash. 478, 75 Am. St. Rep. 849, 58 Pac. 669.) A judgment will not be set aside on an original bill on the ground that it was founded upon a fraudulent intendment or perjured evidence when there were no hindrances besides the negligence of the defendants in presenting the defense in the first suit. (*Brooks v. O'Haro*, 8 Fed. 529, 2 McCrary, 644.)

“The frauds of which a bill to set aside a judgment or a decree between the same parties, rendered by a court of competent jurisdiction, will be sustained, are those which are intrinsic or collateral to the matter tried, and not a fraud which was in issue in the former suit.” (*United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93.)

An injunction will not be granted against a judgment on account of misconduct of counsel, where the remedy at law by a motion to vacate the judgment would have afforded relief. (*Cowley v. Northern Pac. R. R. Co.*, 46 Fed. 325.) Ignorance or mismanagement of the case by the attorney will not authorize relief by injunction against a judgment at law, (*Winchester v. Grosvenor*, 48 Ill. 517; *Lowe v. Hamilton*, 132 Ind. 406, 31 N. E. 1117; *Mouser v. Harmon*, 96 Ky. 591, 29 S. W. 448.) The mistake of an attorney in pleading will not authorize an injunction against the judgment. (*Green v. Robinson*, 5 How. (Miss.) 80; *Hambrick v. Crawford*, 55 Ga. 335; *Owens v. Ranstead*, 22 Ill. 161; *United States Bank v. Daniel*, 12 Pet. (37 U. S.) 32, 9 L. ed. 989.) The general rule is that parties are not entitled to relief from a judgment

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entered against them on account of the negligence of their counsel. (*Jones v. Vane*, 11 Idaho, 353, 83 Pac. 110; *Haight v. Green*, 19 Cal. 118; *Smith v. Tunsted*, 56 Cal. 175; *Quinn v. Wetherbee*, 41 Cal. 247; *Mulholland v. Hindman*, 19 Cal. 605; *Ekel v. Swift*, 47 Cal. 619.) It is well settled that equity will not relieve against a judgment at law on account of any ignorance, unskillfulness or mistake of the party's attorney (unless caused by the opposite party), nor for counsel's negligence or inattention. The fault in such cases is attributed to the party himself. (1 Black on Judgments, sec. 375.)

SULLIVAN, J.—This suit in equity was brought to restrain and enjoin the collection of a certain judgment in the case of *Miller v. Donovan et al.*, 11 Idaho, 545, 83 Pac. 608. Reference is here made to the facts of that case as stated in the opinion, and we shall not repeat them here. It is sufficient to say that this suit was brought to restrain and enjoin the collection of the judgment entered in that case, and is based on the following grounds alleged in the complaint, to wit: 1. That there was a total want of consideration for the contract for the purchase of the sawlogs mentioned in the complaint in the original action, for the reasons that no part of said logs were ever delivered, and that said logs were seized by agents of the United States government under the claim that they were cut in violation of the laws of Congress upon the public domain. 2. That the attorneys of the defendants in that action, who are appellants here, by their negligence and unskillfulness or by reason of their reliance upon certain decisions of courts of last resort, neglected and failed to frame the answer of the appellants to the complaint in that action in such skillful and comprehensive manner as would enable them on the trial of the case to properly present their several defenses, and that such neglect and unskillfulness was committed in opposition to the positive instructions of appellants, and that it would be contrary to good conscience and to justice to make appellants suffer by reason of such neglect and unskillfulness. It is also alleged that the evidence in that case on behalf of this respondent was false,

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fraudulent and perjured in certain particulars which are set out in the complaint, and the prayer was that the respondent be restrained and enjoined from collecting that judgment. A general demurrer was interposed to the complaint and sustained by the court. A general demurrer admits the facts properly pleaded. Then the question for decision is: Does the complaint state a cause of action?

Counsel for appellants bases his claim for equitable relief upon three grounds, to wit: 1. Want of consideration for the contract sued on and that it is against public policy; 2. The negligence and unskillfulness of the attorneys for appellant in the original suit; and 3. False testimony given on the trial.

1. As to want of consideration for the contract sued on and its being against public policy: If there was a want of consideration or the contract was against public policy, the defendants certainly knew it at the time they answered in the original suit. It was their duty if they relied upon that as a defense to have plead it in the original action. Want of consideration in a contract will not warrant a court of equity in enjoining the collection of a judgment at law. If the logs in controversy were not delivered to the appellants at the time the original suit was brought, they certainly knew that fact and should have pleaded it in that action. In *Green v. Robinson*, 5 How. (Miss.) 80, it was held that equity would not grant a new trial on the ground that the contract was against public policy, where the defendant, through negligence, failed to make that defense at law.

2. It is contended that the defendants were prevented from making and preparing a full and complete defense by reason of the negligence and unskillfulness of their attorneys, and it is alleged in the complaint of what such negligence and unskillfulness consisted. It is alleged they mistook the law and concluded that they could establish certain defenses without pleading them. We think it is well established that a mistake or unskillfulness of an attorney is not sufficient to authorize an injunction to issue to restrain the enforcement of a judgment at law. In the case at bar it is alleged that the appellants failed to interpose all of their defenses in the

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trial court, but that is not cause for an interposition of a court of equity. (*Hambrick v. Crawford*, 55 Ga. 335; *Owens v. Ramstead*, 22 Ill. 161.) It was held in *United States Bank v. Daniel*, 12 Pet. (37 U. S.) 32, 9 L. ed. 989, that courts will not relieve for mere mistakes at law.

It was held by this court in *Jones v. Vane*, 11 Idaho, 353, 82 Pac. 110, that, as a general rule, parties are not entitled to relief from a judgment entered against them on account of the negligence of their counsel. However, that decision was by a divided court upon the point whether the complaint in that action stated a cause of action. In that case the allegations of the complaint showed that the attorney had betrayed his client. In *Lowe v. Hamilton*, 132 Ind. 406, 31 N. E. 1117, it was held that the erroneous advice of an attorney is not such a mistake as will entitle the client to relief from a judgment. In 1 Black on Judgments, section 375, the author states as follows: "It is well settled that equity will not relieve against a judgment at law on account of any ignorance, unskillfulness or mistake of the party's attorney (unless caused by the opposite party), nor for counsel's negligence or inattention. The fault in such cases is attributed to the party himself. Thus, the neglect of an attorney to plead a proper and valid defense . . . whereby a judgment is wrongfully obtained against the client, furnishes no ground for relief against the judgment." The author in the same section states that there are a few exceptions to the general rule to be discovered in the books and refers to an early case in Tennessee and cases in New York, and concludes his statement as follows: "With a fine spirit of humanity, but with little regard for the settled principles of law, they declare that they will not suffer a client to be ruined because he has employed an incompetent or unworthy attorney." We conclude that the allegations in the complaint of the negligence and unskillfulness of the attorney do not state a cause of action.

As to the third error assigned: It is well settled that a suit in equity may be maintained to enjoin or restrain the enforcement of a judgment that has been obtained by fraud or perjured evidence under certain facts and circumstances. It

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is laid down in *Phelps v. Peabody*, 7 Cal. 50, that courts of equity will only interfere to enjoin a judgment at law rendered against a party by reason of fraud or accident unmixed with any fault or negligence of himself or his agents. (See, also, *Zellerbach v. Allenburg*, 67 Cal. 296, 7 Pac. 908.) The case of *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159, 27 Pac. 537, 13 L. R. A. 336, is a well-considered case. To it is attached an exhaustive note by Mr. Freeman. In that case the superior court sustained a general demurrer to the complaint as was done in the case at bar, and gave judgment for the defendants, from which judgment that appeal was taken. The facts of that case are clearly stated therein by Chief Justice Beatty. It appears that a witness by the name of Johnson had full knowledge of the transaction involved in that action, and had made certain statements concerning it to the effect that the transaction between the plaintiff and defendant was a loan and mortgage, and not a sale. The plaintiff called him as witness on the first trial of the action, and he testified that the transaction sued on was an absolute sale instead of a loan and mortgage, as he had before stated. It thereafter appeared that the defendant Cohn had paid the witness \$2,000 to so testify, and it was held by the court on appeal that it sufficiently appeared from the allegations of the complaint that upon proof of the facts therein stated there was reasonable certainty that the plaintiff would, upon another trial, gain his cause. The court then asks the question: "Such being the case, is plaintiff entitled to a decree vacating and annulling the former decree on the ground that it was procured by fraud?" and said: "After a careful and extended examination of the authorities we are constrained to answer this question in the negative. That a former judgment may be set aside for some frauds there can be no question, but it must be a 'fraud extrinsic or collateral' to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of the rule is that there must be an end of litigation, and when parties have

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once submitted a matter or have had an opportunity of submitting it for investigation and determination, and when they have exhausted every means for review or determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from court by a false promise of compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest. (*United States v. Throckmorton*, 98 U. S. 65, 66, 25 L. ed. 96.) In all such instances the unsuccessful party is really prevented by the fraudulent contrivance of his adversary from having a trial; but when he has had a trial, he must be prepared to meet and expose perjury then and there. He knows that a false claim or pretense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that, necessarily, the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong, in such case, is of course a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is, that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for if this could be done

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once, it could be done again and again *ad infinitum*." In that case Chief Justice Beatty holds that a former judgment may be set aside for "some frauds," but it must be a fraud "extrinsic or collateral" to the questions examined and determined in the action. The learned chief justice then asks the question; "What, then, is an extrinsic or collateral fraud within the meaning of this rule?" and refers to instances given in the books such as keeping the unsuccessful party away from court by a false promise of a compromise, or purposely keeping him in ignorance of the suit, or where an attorney fraudulently pretends to represent a party or connives at his defeat, or being regularly employed, corruptly sells out his client's interest. He does not attempt to state all the frauds "extrinsic or collateral" to the question examined and determined in an action for which a suit in equity may be maintained to restrain the enforcement of a judgment at law, but only mentions some of them. As we view it, the most important and decisive case upon the question under consideration is that of *United States v. Throckmorton*, *supra*, in which the opinion was prepared by Mr. Justice Miller. That was a bill in chancery in the circuit court of the United States for the District of Columbia for the purpose of setting aside a decree of confirmation of a Mexican grant. The fraud alleged in the bill was that Richardson, in whose favor the decree of confirmation was had, during the pendency of the proceedings for confirmation, obtained from the governor of California his signature to the grant, and falsely antedated it so as to impose on the court the belief that it was made while that governor had the power to make it, and in support of said false document Richardson procured and filed therewith the depositions of perjured witnesses. A demurrer to the bill was sustained and judgment was thereupon entered dismissing it. Said circuit court, in rendering its decision, held that the frauds alleged in that bill were not such "extrinsic and collateral" acts as would justify the interference of equity with the decree of confirmation, and the court mentions some of such extrinsic and collateral acts for which a suit in equity may be maintained, to wit, keeping

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the adversary's witnesses away; secreting or purloining his testimony; or, if the citation to him be given under such circumstances as to defeat its purpose, and the court says: "Any conduct of the kind mentioned would tend to prevent a fair trial on the merits and thus to deprive the party of his rights, so if the judge sit when disqualified from interest, or consanguinity; if the litigation be collusive; if the parties be fictitious, or if the real party affected be falsely stated to be before the court, the judgment recovered may be set aside or its enforcement restrained." Mr. Justice Miller, after stating the facts, learnedly discusses the question under consideration, and reviews and comments upon many cases touching upon that question, and holds that mistakes in law or facts, or newly discovered evidence since the trial, may all be presented in the same suit and relief given therein, and if there are any mistakes in those matters made by the trial court, the erroneous decision may be corrected on appeal or by writ of error. Thus indicating that every error which under the law may be corrected in the same proceeding must be corrected there. The learned justice states that there is an admitted exception to the general rule. "In cases where, by reason of something done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case; where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as keeping him away from court or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party or connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these and similar cases which show that there has never been any real contest in the trial or hearing of the case are reasons for which a motion for new suit may be sustained, to set aside and annul the former judgment or decree and open the case for a new and a fair hearing"; and cites a number of authorities in support of that rule. In the cases cited by the learned justice and many others relief has been

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granted on the ground that by some fraud practiced directly upon the party seeking relief against a judgment or decree, that the party has been prevented from presenting all of his case to the court, it is then said: "On the other hand, the doctrine is well settled that the court will not set aside a judgment because it was founded upon fraudulent instruments or perjured evidence or for any matter which was actually presented and considered in the judgment assailed." The learned justice cites the case of *Greene v. Greene*, 2 Gray, 361, 61 Am. Dec. 454, and states that the best discussion of the whole subject is found in that case. That was a bill filed by a wife against her husband for a divorce, and in her bill she alleged that the former decree was obtained by fraud and collusion and false testimony. The court was of the opinion that those allegations meant that the husband colluded or combined with other persons than the complainant to obtain false testimony, or to otherwise aid him in fraudulently obtaining his decree. Chief Justice Shaw said there that the "court thinks the point was settled against the complainant by authority; not specifically in regard to divorce, but generally as to the conclusiveness of judgments and decrees between the same parties." He then examines the authorities, English and American, and adds: "The maxim that fraud vitiates every proceeding must be taken like other general maxims, to apply to cases where proof of fraud is admissible, and where the same matter has been actually tried or so in issue that it might have been tried, it is not made admissible. The party is estopped to set up such fraud because the judgment is the highest evidence and cannot be contradicted." It is otherwise with a stranger to the judgment. After reviewing many authorities, Mr. Justice Miller concludes: "We think these decisions establish the doctrine on which we decide the present case, namely, that the acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered. That the mischief

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of retrying every case in which the judgment or decree rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterward ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases.”

In the case of *Pico v. Cohn*, *supra*, the defendant paid the witness Johnson \$2,000 for testifying falsely in that case, and the court held that that was not a fraud “extrinsic or collateral” to the question tried. In the case of *United States v. Throckmorton*, *supra*, Richardson procured from the governor his signature to a grant and falsely antedated it so as to impose on the court the belief that it was made at a time when the governor had the power to make it, and the supreme court of the United States held that that was not a fraud “extrinsic or collateral” to the matter tried by the court. The correct rule as laid down in the case of *United States v. Throckmorton*, *supra*, is that the cases in which the relief prayed for in that action had been granted are those in which, by fraud or deception practiced on the unsuccessful party, he has been prevented from fully exhibiting and trying his case, by reason of which there never had been a real contest before the court of the subject matter of the suit. As to the grounds of relief against a judgment obtained by fraud, Freeman, in his work on Judgments, fourth edition, section 489 says: “It must be borne in mind that it was not fraud in the cause of action, but fraud in the management which entitles a party to relief. The fraud for which a judgment may be vacated or enjoined in equity must be in the procurement of the judgment. If the cause of action is vitiated by fraud, that is the defense which must be interposed, and unless interposition is prevented by fraud, it cannot be asserted against the judgment, for judgments are impeachable for those frauds only which are extrinsic to the merits of the case and by which the court has been imposed upon or misled into a false judgment. They are not impeachable for frauds relating to merits between the parties. All

Points Decided.

mistakes and errors must be corrected from within by motion for a new trial or to reopen the judgment or by appeal."

Mr. Freeman reviews many cases in the note to *Pico v. Cohn*, *supra*. While he does not agree with some of the authorities in regard to what frauds are "extrinsic or collateral," he concludes that the supreme court of the United States, in *United States v. Throckmorton*, *supra*, stated the true ground upon which its action in that case was supportable. It is clear to us, from the decided preponderance of the adjudicated cases upon the question under consideration that the allegations in the complaint in the action at bar in regard to false, fraudulent and perjured testimony and the negligence and unskillfulness of appellants' attorney, do not state a cause of action, and aside from that we think it sufficiently appears that such evidence could have been met on the trial of the case if the defendants had exercised reasonable diligence in procuring it. We therefore conclude that the complaint does not state a cause of action, and that the court did not err in sustaining demurrer thereto. Costs of appeal are awarded to the respondents.

Stockslager, C. J., and Ailshie, J., concur.

(November 14, 1906.)

MARY E. EDMINSTON, Plaintiff, v. E. C. STEELE, Judge,
Defendant.

[87 Pac. 677.]

PROHIBITION—APPEAL FROM JUSTICE COURT—APPEAL BOND—SUFFICIENCY.

1. On appeal from a justice court to the district court, where the appellant gives "an undertaking for the payment of costs on the appeal to the district court and for a stay of execution," and the sureties are bound in a sum exceeding \$100, though not in an amount sufficient to stay the proceedings, and the undertaking

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contains all the obligations required in appeal bonds, such undertaking will be held sufficient to perfect the appeal, and in such case a motion to dismiss the appeal was properly overruled by the district court.

2. Where there is no uncertainty as to the conditions and obligations of an undertaking on appeal, the bond will be held effectual for the purposes of the appeal, although coupled with an invalid or insufficient stay bond.

(Syllabus by the court.)

ORIGINAL application for a writ of prohibition. Defendant demurred to the petition. *Demurrer sustained and cause dismissed.*

John O. Bender, for Plaintiff, cites no authorities on points decided.

E. A. Cox and Edward S. Fowler, for Defendant.

A bond intended for both stay and appeal, but insufficient for both purposes, is still good as an appeal bond, if it contains all the necessary conditions of an undertaking on appeal. (Hayne on New Trial and Appeal, sec. 213; *Zoller v. McDonald*, 23 Cal. 136; *Ward v. Superior Court*, 58 Cal. 519; *Dobbins v. Dollarhide*, 15 Cal. 374; *Mokelumne Hill C. & M. Co. v. Woodberry*, 10 Cal. 186; *Zapp v. Michaelis*, 56 Tex. 395; *Cruger v. Douglas*, 8 Barb. (N. Y.) 81; *Balph v. Hoggart*, 2 La. Ann. 462; *Lewis v. Splane*, 2 La. Ann. 754; *Ludeling v. Frellsen*, 4 La. Ann. 534; *Marshall v. Grand Gulf Co.*, 5 La. Ann. 360.)

AILSHIE, J.—This is an application for a writ of prohibition. To the plaintiff's petition the defendant had demurred on the ground that the petition does not state facts sufficient to entitle her to the relief demanded. This application grows out of the following state of facts: The plaintiff, Mary E. Edminston, commenced an action in the justice court and obtained a judgment for the total sum of \$86.40. The defendant in that action, Martha Smith, served and filed her notice of appeal, and gave an undertaking in the following

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form: "Whereas, the above-named defendant, Martha Smith, desires to give an undertaking for the payment of costs on an appeal to the district court and for a stay of execution against the property of the said Martha Smith in the above-entitled case;

"Now, therefore, we, the undersigned sureties, do hereby obligate ourselves jointly and severally to the above-named plaintiff, Mary E. Edminston, under the said statutory obligations and all statutory obligations applicable to such undertaking in appeal and for a stay of proceedings in the sum of one hundred eighty dollars (\$180)."

When the case came on in the district court, the plaintiff here, who was respondent there, made a motion to dismiss the appeal on the following grounds: "That no undertaking on appeal for the payment of costs has been executed, or filed by appellant, Martha Smith; and that the undertaking executed by her to stay proceedings is not in a sum equal to twice the amount of the judgment rendered in the justice court including costs; that this court has no jurisdiction of this case."

After hearing the motion the court overruled the same, and thereupon the respondent, who is plaintiff here, applied to this court for a writ prohibiting and restraining the district court from proceeding to a trial of the cause. It is contended by the plaintiff that the undertaking given on appeal from the justice court to the district court is so indefinite and uncertain that it is neither good as an appeal bond nor as a stay bond. It is conceded by both sides that the undertaking is not in a sufficient amount to stay the proceedings as required by section 4842, Revised Statutes. (*Wilson v. Doyle, ante*, p. 295, 85 Pac. 928.) Counsel who appear for the defendant judge contend that the undertaking is in due form for an appeal bond and is in a sufficient amount, and that although it is not sufficient to stay proceedings, it is good as an appeal bond, and that the court correctly overruled the motion. It will be seen from an examination of this undertaking that it contains the language of the statute required in undertakings on appeal from a justice court, namely, that it is "for the payment of costs on appeal." On the other hand,

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the obligation in the latter clause is in conformity with the act providing a form for undertakings, approved February 14, 1899 (Sess. Laws, 1899, p. 235), and binds the sureties in accordance therewith, namely, "the sureties bind themselves under the said statutory obligations and all statutory obligations applicable to such undertaking on appeal." The undertaking seems to contain all the obligations and requirements necessary for an undertaking on appeal, and the fact that it was also attempted to include therein a bond for stay of proceedings and that the amount of the obligation was not sufficient for that purpose does not invalidate or vitiate the first obligation to pay costs of the appeal. There can be no doubt, we think, but that the bondsmen can be held on this undertaking for the costs of the appeal to the extent of \$100 under the statutory obligations. Such being the case, it would have been error for the district court to have dismissed the appeal. As to the extent, if any, of the obligation entered into by the sureties for stay of proceedings, that is not a matter involved in this case, and we have no occasion to consider it here. It must be assumed that this undertaking was given for a purpose—the first purpose to be served by an undertaking in such case is to perfect the appeal, because if there is no appeal, there can be no stay of proceedings—there will be nothing to stay. The bond, whatever its conditions or the amount of the obligation as to stay of proceedings, could serve no purpose if there is no valid appeal. The primary object of the party appealing from the justice court in giving an undertaking must have been to comply with section 4842, Revised Statutes, and make the appeal "effectual."

Counsel for plaintiff have placed some reliance upon the decision of this court in *Wilson v. Doyle*, *supra*, and *Numbers v. Rocky Mt. Bell Tel. Co.*, 7 Idaho, 408, 63 Pac. 381. Those cases each turned upon different facts from those involved here, and neither one of them is decisive of this question. Counsel also cites *Duffy v. Greenebaum*, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323; *Galloway v. Tjossen*, 22 Wash. 103, 60 Pac. 129; *Buzley v. Sessions*, 22 Wash. 125, 60 Pac. 130; *Town of*

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Sumner v. Rogers, 21 Wash. 361, 58 Pac. 214, in support of plaintiff's contention.

Duffy v. Greenebaum is not in point, for the reason that the undertaking there considered by the court was held not to contain the necessary obligations required in an appeal bond, and only amounted to a stay bond. The other cases cited by plaintiff are from the state of Washington, and appear to support his position. We are not, however, inclined to follow those authorities. They do not seem to us well founded, and have never met with the unanimous approval of that court. As late as the case of *Douglas v. Badger State Mine*, 41 Wash. 266, 83 Pac. 178, 4 L. R. A., N. S., 196, Mr. Justice Fullerton repudiated the doctrine that had been previously followed and approved by a majority of that court and said: "In my judgment a bond sufficient in condition and amount as an appeal bond is good as an appeal bond, regardless of any condition looking to the stay of the judgment it may contain." The view we have taken in this case seems to have been entertained in California under the statutes from which ours were taken and prior to their adoption in this state. (*Mokelumne Hill C. & M. Co. v. Woodberry*, 10 Cal. 186; *Dobbins v. Dollardhide*, 15 Cal. 374; *Zollar v. McDonald*, 23 Cal. 136; *Ward v. Superior Court*, 58 Cal. 519.) There was no error in the trial court overruling respondent's motion to dismiss the appeal and setting the case for trial. Defendant's demurrer to the petition herein will be sustained, and the case is dismissed with costs in favor of defendant.

Stockslager, C. J., and Sullivan, J., concur.

Points Decided.

(November 17, 1906.)

JULIA F. ANDRINO, Plaintiff, v. SARAH E. YATES, Defendant.

[87 Pac. 787.]

HABEAS CORPUS—CUSTODY OF MINOR CHILD—RIGHT OF PARENT—RELINQUISHMENT OF—WELFARE OF CHILD—EXAMINATION OF CHILD.

1. The right to the guardianship of a minor cannot be tried upon *habeas corpus*.

2. This proceeding was not for the purpose of setting the child free, but to determine whether the plaintiff was entitled to its custody.

3. The jurisdiction of the question of the custody of a child under a writ of *habeas corpus* is of an equitable nature, and courts have large discretion in the matter.

4. Under the provisions of section 5774, Revised Statutes, the parent is entitled to the guardianship of his minor child when he is competent to transact his own business and not otherwise unsuitable as guardian.

5. The legal right to the custody of a minor may be abandoned or forfeited by the acts or conduct of the parent, and in such case he is equitably estopped from asserting such legal right.

6. Where the legal right of the parent is not clear, the best interest of the child will govern the decision of the court.

7. When it appears that a child has resided with its aunt from the time it was about two and one-half years old until it is nearly twelve years of age without having seen its mother, and that conditions are such, and made so by the acts of the parent, that the care and custody of the child cannot be changed without endangering the happiness and welfare of the child, the parent has become, in the language of section 5774, Revised Statutes, "unsuitable" for possession of the child.

8. In such cases the welfare of the child is the main consideration for the court.

9. In cases of doubt and difficulty the court may examine the minor, when it is of sufficient age and discretion, as to its wishes and desires in the matter; not that its wishes must control in the matter, but that the court might more wisely arrive at a just conclusion in the case.

(Syllabus by the court.)

Argument for Petitioner.

ORIGINAL application for a writ of *habeas corpus* to determine the right to the care and custody of minor child. Application denied. *Writ quashed and child remanded.*

Fogg, Nugent & Cassady, for Petitioner.

That the parent, if living and not shown to be incompetent, is absolutely entitled to the guardianship of the child is firmly settled by the decisions of the supreme court of California upon statutes practically identical with our own.

It is the common law, as stated by all text-writers on the subject, and settled by the decisions of courts, with substantial unanimity, that the father or mother, if living and not affirmatively shown to be incompetent, are absolutely entitled to the custody of their minor child, as against an official guardian. The statutes of Idaho, however, expressly give that right to the parent. (Rev. Stats., secs. 5774, 5775.) These sections were taken from the Code of Civil Procedure of California, and were construed by the courts of that state before their adoption in this state. (*Lord v. Hough*, 37 Cal. 668.)

The amendment of section 5774, page 302, Session Laws of 1899, gave the mother the same right as the father to the custody of the child, and removed the restriction depriving the mother of the right by remarriage. The claim of the father as natural guardian of the custody of his child is superior to that of an official guardian. (*Ex parte Davidge*, 72 S. C. 16, 51 S. E. 269.)

The appointment of a legal guardian does not deprive a father of his right to the custody of his child. (*Gilmore v. Kitson*, 165 Ind. 402, 74 N. E. 1083.)

The presumption of the mother being a competent and suitable person will prevail in absence of strong and convincing evidence showing beyond a doubt that she is unsuitable or incompetent. (*Miller v. Wallace*, 76 Ga. 479, 2 Am. St. Rep. 48.)

And even in a case where the father gave his son to a man of good character and ample means to keep him during minority, the mother, after the death of the father, may maintain

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habeas corpus for the child, and this, although she was poor and dependent, and he preferred to remain with the defendant. (21 Cyc. 24; *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375.)

Lycurgus Vineyard and E. M. Griffiths, for Defendant.

SULLIVAN, J.—This is an application for a writ of *habeas corpus* by the mother to obtain possession of her now about twelve years of age daughter. The facts of the case are substantially as follows: It appears that the petitioner intermarried with one Thomas Stewart in the state of Oregon in the year 1893 or 1894; that after said marriage they lived near Jacksonville in said state; that on the twenty-fifth day of February, 1895, the child Phoebe M. Stewart, was born; that the married life of the petitioner and her said husband was not congenial, and when the child was about eight months old the petitioner left her husband, taking the child with her, and left it with an aged couple residing at Medford, Jackson county, state of Oregon. The child remained there until about the month of November, 1897, about two years, when it was delivered by its father to the daughter of Mrs. Yates, to be delivered to the defendant in this proceeding, who was the sister of the said Stewart, where the child remained until the present time. The father died about a year after the child was placed in the hands of Mrs. Yates. It appears from the record that the petitioner, after leaving the child with the aged couple referred to, went to California and remained at different places in that state for some time; she thereafter went to Nevada and was there married to a butcher. It also appears that her married life with the butcher was not congenial and she left him and returned to California. Afterward she left California and went to Tombstone, Arizona, where about a year prior to this time she married her present husband, Barney Andrino. It appears that Andrino is engaged in the saloon business and has a home in said town and is worth about \$7,000; that he has a

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pleasant home in that place. It also appears that from the time the child was left with the aged couple in Oregon, the petitioner wrote to them very seldom and sent them about \$10 to pay for the care, clothing and nurture of the child; that the child was not quite three years old when it was placed in the care of Mrs. Yates by its father; that Mrs. Yates has taken care of it from that time to this; that during those eight or nine years six or seven letters were received from the petitioner by the daughter of Mrs. Yates, in which she inquired about the child and said that she wanted to keep track of it, but did not want to take it from Mrs. Yates. During that time the petitioner did not send any money, clothing or presents of any kind to the child. It further appears that the petitioner has no means of her own with which to pay for the care and schooling of the child. It also appears that her husband Andrino would be pleased to have his wife take the child and that he would furnish the means for its support, clothing and schooling. The child is now nearly twelve years of age, has become very much attached to its aunt, Mrs. Yates; that it does not wish to go with its mother, but desires to remain with its aunt. It also appears from the record that the probate court of Idaho county issued letters of guardianship, whereby Mrs. Yates was appointed guardian of said child. However, the application for letters of guardianship was not made until about the month of July, 1906, and after Mrs. Yates was convinced that the petitioner was going to make an effort to get possession of the child.

Some technical questions have been raised in this case with regard to collateral attacks on orders or judgments of the probate court in guardianship matters, but, as we view it, it is not necessary for us to pass upon those questions. It is contended by counsel for plaintiff under the provisions of section 5774, Revised Statutes of Idaho of 1887, as amended by Session Laws of 1899, page 302, that the mother of a minor child being competent and not unsuitable, is absolutely entitled to the guardianship of the minor. That, we think, is the correct construction of the provisions of that section,

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but we think it is well settled that the right to the guardianship of an infant cannot be tried upon *habeas corpus*. (Hurd on Habeas Corpus, p. 457.)

This is not the case of an adult appealing to the aid of *habeas corpus* to obtain his freedom from illegal restraint, but the writ in this case was granted to inquire whether the plaintiff is entitled to the custody of said minor child. The proceeding is not for the purpose of setting the child free, but to determine whether the petitioner is entitled to its custody, and the correct view or rule is that the jurisdiction of the question of the custody of a child under a writ of *habeas corpus* is of an equitable nature, and courts are given large discretion in the matter.

As stated in Hurd on Habeas Corpus, page 528: "The welfare of the infant is the polar star by which the discretion of the court is to be guided." Of course the legal rights of the parent must be respected, and the law contemplates that those rights may have been abandoned, surrendered, transferred or forfeited, for it is declared in said section 5774 as amended that either the father or the mother of the minor child, being themselves respectively competent to transact their own business and not otherwise unsuitable, must be entitled to the guardianship of the minor. Under the facts presented by the proofs and record, it is clear to us that the plaintiff surrendered her legal rights as mother to the care and custody of said minor when it was an infant about eight months old, and did not see it nor give its care and custody any attention for a period of about eleven years, except an occasional letter making inquiry in regard to the whereabouts of the child. It is true she sent about ten dollars to the old folks with whom she left the child. But during the eight or nine years that the defendant has had charge of the child the record and evidence fails to show that the petitioner has exhibited any motherly feeling or affection for the child in any way or manner. It is true she wrote perhaps once a year for the purpose of keeping track of the child, but she never sent her so much as a doll

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or any present whatever during those eight or nine years. Her original legal right as mother was abandoned, forfeited or surrendered, and cannot now be reasserted to the manifest injury of the child. Her strict legal custody has ceased to be a rightful custody, and she is equitably estopped from asserting it as a legal right. It is a legal principle that when the right of the parent is not clear, the best interest of the child will govern the court. That being true under the facts as they appear from the record, the welfare of the child is the main object to be attained. The child is a bright girl, nearly twelve years of age, and never has known any mother except her aunt, the defendant. She has grown up in the ways and customs of her aunt's household. Her friends are there and her affections are there centered. She is being well cared for, and while she is not as far advanced in her studies as many children of her age, her education is not being neglected, as she has for the last two years attended the Grangeville village schools.

On the other hand the conduct of the mother furnishes reason for supposing that she had surrendered the care and custody of the child to the defendant for more than eight years, during most of the conscious lifetime of the child, with the understanding that she would not reclaim it. She made no offer to contribute to its support. By her own acts of omission she has permitted, allowed and encouraged the child to fix her affections on her aunt and cousins, among whom it has resided since its infancy, and it is clear to us that the condition of things cannot now be changed without endangering the happiness and welfare of the child. The welfare of the child is the main consideration for the court under the facts of this case, and nothing that would throw any light upon the matter should be overlooked by the court. As the minor is now a well-developed, bright girl nearly twelve years of age, the court questioned her in regard to her wishes and desires in the matter. Not that the child's wishes should control in the matter, but that the court might more wisely exercise its discretion and might learn its feel-

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ings, its attachments, its reasonable preferences, its probable welfare and contentment. The practice of consulting the infant's wish is well established in such cases. (Hurd on Habeas Corpus, p. 527.) In this case the court examined the child privately and alone and she was also sworn and testified in open court.

It was stated by counsel for the plaintiff on the oral argument of this case that the plaintiff desired to give the child better educational advantages than she was receiving in the Grangeville public schools, and that she would be willing to pay the expenses of placing and maintaining the child in some good school. That is a matter to be presented to the probate court of Idaho county, and in case the plaintiff desires to have the child placed in some good school in this state and will pay the expenses of the child therein, the probate court must see that it is done. It is not intended to deprive the mother from seeing and visiting the child at all proper times and places.

The application of the petitioner is denied and the child remanded to the care and custody of the defendant, Mrs. Sarah E. Yates, until the further order of the court. Costs are awarded to the defendant.

Stockslager, C. J., and Ailshie, J., concur.

(November 19, 1906.)

J. T. HARRISON et al., Appellants, v. RUSSELL & COMPANY, Respondent.

[87 Pac. 784.]

CONTRACT OF SALE—WARRANTY OF PROPERTY SOLD—TIME FOR TESTING MACHINERY—NOTICE OF DEFECTS—WAIVER.

1. Where the contract of sale of a threshing-machine contains a warranty that is limited and conditioned by the following provision: "Continued possession or use of machinery for six days

Argument for Appellants.

shall be conclusive evidence that the warranty is fulfilled to the full satisfaction of the undersigned, who agree thereafter to make no further claim on Russell & Company under warranty"; the "possession" therein mentioned is held to mean a possession coupled with a possibility or opportunity of using or testing the property for the uses and purposes to which it is to be applied.

2. A provision in a contract that: "No promises, whether of agent, employee, or of attorney, in respect to the payments, and security, or the working of the machinery named, will be considered binding unless made in writing, ratified by the home or branch office," does not prevent the company's agent waiving written notice by going to the place where the machinery is being operated, and taking charge of the machinery and working on it with a view to putting it in a condition so that it will comply with the warranty.

3. The purpose of notice to the vendor of defects in the machinery under a contract of warranty such as in this case is to enable a vendor to send its agent or employee to the property and put it in running order and remedy defects, and when that purpose has once been served, and the agent or employee has actually gone and taken charge of the property and undertaken to put it in running order, the purpose of notice is served, and it becomes immaterial whether any notice has been given at all.

(Syllabus by the court.)

APPEAL from the District Court of the Second Judicial District for Latah County. Hon. Edgar C. Steele, Judge.

Action by plaintiffs for surrender and cancellation of certain promissory notes. Judgment for defendants and plaintiffs moved for a new trial, which was denied. Plaintiffs appealed from the judgment and order. *Reversed.*

S. S. Denning, for Appellants.

Conditions inserted in a contract, and involving forfeiture of a right of a recovery of damages for a breach thereof, must be strictly construed. (*Insurance Co. v. Earle*, 33 Mich. 151; *Massachusetts Loan etc. Trust Co. v. Welch*, 47 Minn. 183, 49 N. W. 740.)

It is provided in the contract that no promise, whether of agent, or employee, or attorney, in respect to the payment

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or the working or guaranty, of the machine named, will be considered binding unless in writing and ratified by the home or branch office. Such provisions as this are uniformly considered to be limitations upon the capacity of the corporation for further action, which it cannot impose upon itself, and such provisions cannot operate to prevent waiver by the corporation of the conditions of the contract which would, except for the prohibition, legally result from the acts of its authorized agents with reference to the machinery. (*Nichols v. Shepard Co. v. Wiedemann*, 72 Minn. 344, 75 N. W. 208, 76 N. W. 41; *Massachusetts etc. Trust Co. v. Welch*, 47 Minn. 183, 49 N. W. 740; *Lamberton v. Connecticut Fire Ins. Co.*, 39 Minn. 129, 39 N. W. 76, 21 L. R. A. 222; *Flatt v. D. M. Osborne Co.*, 33 Minn. 98, 22 N. W. 440; *Davis v. Robinson*, 67 Iowa, 355, 25 N. W. 282; *Aultman & Taylor Co. v. Frazier*, 5 Kan. App. 202, 47 Pac. 157; *Viele v. Insurance Co.*, 26 Iowa, 9, 96 Am. Dec. 83; *Younge v. Insurance Co.*, 45 Iowa, 377, 24 Am. Rep. 784; *American Cent. Ins. Co. v. McCrea*, 8 Lea, 513, 41 Am. Rep. 647; *Van Bories v. Insurance Co.*, 8 Bush., 133; *Insurance Co. v. Gusdorf*, 43 Md. 506; *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *Stolle v. Insurance Co.*, 10 W. Va. 546, 27 Am. Rep. 593; *Carrugi v. Insurance Co.*, 40 Ga. 135, 2 Am. Rep. 567; *Wakefield v. Insurance Co.*, 50 Wis. 532, 7 N. W. 647; *Whited v. Insurance Co.*, 76 N. Y. 415, 32 Am. Rep. 330; *Morrison v. Insurance Co.*, 69 Tex. 353, 5 Am. St. Rep. 63, 6 S. W. Rep. 605.)

We were entitled to show the whole circumstances of the case, the capacity of the agents, the taking back of the machine and the making of the new contract, together with the whole circumstances connected therewith. (*Nichols & Shepard Co. v. Wiedemann*, 72 Minn. 244, 75 N. W. 208, 76 N. W. 41; *Massachusetts Loan & Trust Co. v. Welsh*, *supra*; *Flatt v. D. M. Osborne Co.*, 33 Minn. 98, 22 N. W. 440; *Davis v. Robinson*, 67 Iowa, 355, 25 N. W. 280; *Baker v. Nichols & Shepard Co.* (leading case), 10 Okla. 685, 65 Pac. 100; *Aultman-Taylor Co. v. Frazier*, 5 Kan. App. 202, 47 Pac. 156; *Acker v. Kimme*, 37 Kan. 276; 15 Pac. 248.)

Forney & Moore, for Respondent.

The failure to give the stipulated notice is an acceptance of the machine and a waiver of damages for defects. (*Murphy v. Russell & Co.*, 8 Idaho, 133, 67 Pac. 421, and cases cited in the opinion.)

The case at bar is on all-fours with the *Murphy* case, unless it be that the present case is stronger against the appellants. There is no allegation in appellant's complaint that within six (6) days after taking possession of the property any notice whatever was given of any defects. There is no allegation of the terms of the warranty in the contract of purchase, nor is there any allegation that the appellants complied with the contract of purchase in any particular.

AILSHIE, J.—The appellants commenced this action to have three certain promissory notes previously executed by them and delivered to the respondent surrendered and canceled, and for the recovery of the sum of \$250 previously paid on the notes, and to recover the further sum of \$106.30 for work and labor performed and supplies furnished respondent in connection with the transaction for which the notes were given. The respondent, defendant in the lower court, answered, denying the allegations of plaintiffs' alleged cause of action, and alleged that there was due and owing on the three several notes the sum of \$1042.82, and prayed judgment for that sum, together with \$100 attorney fees, interest and costs of the action. It appears that on the seventh day of August, 1900, the appellants executed and delivered to the respondent their three certain promissory notes for the purchase price of a thresher outfit, which they had purchased on the day previous from the defendant company. The company gave plaintiffs a contract warranting the property sold, which warranty is as follows: "That the above articles are to be of the Russell & Co's manufacture, and warranted by them to be of good material, well made, and, with proper management, capable of doing as

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good work as similar articles of other manufacturers. If said machinery, or any part thereof, shall fail to fill this warranty, written notice shall be given Russell & Co., Massillon, Ohio, and to the party through whom the machinery was purchased, stating wherein it fails to fill the warranty, and time, opportunity, and friendly assistance given to reach the machinery, and remedy the defects. If the defective machinery cannot then be made to fill the warranty, it shall be returned by the undersigned to the place where received, and another furnished on the same terms of warranty, or money and notes to the amount represented by the defective machinery shall be returned and no further claim be made on Russell & Co. Continued possession or use of the machinery for six (6) days shall be conclusive evidence that the warranty is fulfilled to the full satisfaction of the undersigned, who agree thereafter to make no further claim on Russell & Co. under warranty." The Harrisons received the property from defendant's warehouse at Palouse City on the sixth day of August, and removed it thence to their premises, and on the eleventh day of August commenced to use and operate the machine. They do not claim to have given the defendant or its local agent any notice as to defects in the property within six days after receiving the property from their warehouse, but they do claim to have given the notices required in the warranty within six days after commencing to use the machine. As soon as the plaintiffs admitted to the trial court that no written notice had been given within six days after receiving the property, the judge informed their counsel that they had by that act waived the benefit of the warranty and that they could in no event hold the defendants under the warranty. Plaintiffs' counsel thereupon offered to prove that written notice had been sent to the company at Massillon, Ohio, on the fifth day after commencing to use the machine, and that they also gave notice to the local agent; that the local agent, subsequent to the receipt of such notice, sent experts to the plaintiffs' premises, and also came in person, and undertook to put the machine

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in such order as to make it run; that plaintiffs talked with the local agent over the telephone, and told him that the machine would not run, and that they were going to return it, and the agent requested them not to return it, and also requested them not to give any written notice, that they did not want the notice, and that they would make the machine run or give them another machine, and that if they failed to furnish them another machine that would run he would give them back their notes. It seems from the evidence and proffered evidence that at least five or six different agents and expert employees of the defendant company went from time to time to the plaintiffs' premises, and examined and worked on this machinery and endeavored to put it in running order, and from time to time requested the plaintiffs to retain the property and assured them that they would make it run or furnish another machine; that after a time they did take this machine back and furnish them another machine, which apparently was no better. The transaction ran along in this manner (according to the statements of plaintiffs' counsel and the offers that he made as to proofs) until the season of 1902, when he was requested by the agent to go to Endicott, Washington, and get another machine they had there called the Buck. Plaintiffs went to Endicott and got the machine, and returned the second machine they had received from the agent to his warehouse and executed new notes for the Buck machine. The plaintiffs say that the agent promised them at that time that he would have the old notes that were given for the first machine returned to him, and would cancel them and wipe out the old contract entirely. The district court refused to admit this evidence offered by the plaintiffs, and thereupon the defendant proved the execution and delivery of the notes and the balance due thereon, after which the court peremptorily instructed the jury to compute the amount due with legal interest and bring in a verdict accordingly in favor of the defendant. A verdict was returned in favor of the defendant for the sum of \$1,107.75. Plaintiffs moved for a new trial, which was denied, and they

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thereupon appealed from the order and judgment. The appellants complain of the action of the trial court in refusing to admit evidence tending to show that they had no opportunity to use the machine for some days after they received it at the warehouse, and that the "possession" mentioned in the warranty was intended to be one coupled with a possibility or opportunity of use. They also claim that the court should have allowed them to show that the defendant, by the action and conduct of its agents, waived the literal and formal compliance with the requirement for giving them notice, and that all of the plaintiff's evidence along these lines tending to show the waiver and the agreements from time to time to make the property good if the plaintiffs would retain it and try to operate it, and also the agreement for exchange of the machine for the last machine secured, was admissible, and should have been allowed. The respondent contends that the case of *Murphy v. Russell & Co.*, 8 Idaho, 133, 67 Pac. 421, fully justifies the action and ruling of the trial court, and is decisive of this case. In that case the purchasers had held the machine from July 14th to July 31st. They had used it a part of the time during that period; and during the meanwhile no complaint had been made to the company or its agent, and they do not appear to have served any written notice of defects as required by the contract. On the other hand, the company never took charge of the property or sent any agent to repair the property or put it in running order, nor did they do any act or thing which in any way tended to show a waiver of the notice. It will at once be seen that the facts of this case are widely different from the facts of the case at bar. It is true that the warranty that was there considered was identical with the warranty in this case. It is also true that there are some things said in that opinion which, if taken alone and independent of the facts in the case, would appear to support the position taken by respondent here. It should be borne in mind, however, that the language there used is directly referable to the particular facts of the case then under discussion, and should be read and considered

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in the light of these facts. Our careful examination of that case satisfies us that the principle involved and the points there determined are not decisive of the case now under consideration.

The warranty provides that "Continued possession or use of the machinery for six (6) days shall be conclusive evidence that the warranty is fulfilled to the full satisfaction of the undersigned, etc." This language should be read and construed in the light of the purposes for which it was used and the circumstances under which it was employed. Now, it certainly could not have been the fair intention of either of the parties that the purchasers should, for the purpose of this warranty, be considered in "possession" of the property until such time as they might have the property at a place where it would be possible to use it for the purpose of threshing grain. The company and its agents when selling this property to plaintiffs undoubtedly learned their place of residence and the community in which they expected to work and operate the property. It certainly could not be said that the six day period began to run at the time of the receipt of the machinery from the warehouse if, as a matter of fact, the purchasers would have had to transport the machinery seventy-five or one hundred miles across a mountainous region in order to reach the community where they lived and expected to do threshing. In that case we do not think the contracting parties would have understood or intended that the "possession" referred to in the warranty should commence until at least a possibility or opportunity of using the property should arise. While there are vast grain producing prairies throughout this state, it is frequently necessary to traverse extensive mountain regions to reach many of these agricultural communities, and we must treat the contracts of business men as having been made in the light of natural conditions, and with a view of becoming valid and operative and of mutual benefit to each of the contracting parties. A construction that would hold the "possession" of the machinery in this warranty to commence, in every case, at the

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time the machinery was received at the depot or warehouse would convert the contract of warranty into simply a waiver of warranty and give the purchaser no benefit whatever. Evidence, therefore, tending to prove a state of facts similar to or within the line of that suggested above, is clearly admissible, and should be allowed in such a case.

Respondent contends that the agent could not waive any condition of the contract or warranty for or on behalf of the company, and in support of that argument calls our attention to the following clause in the contract: "As the condition hereof it is fully understood and agreed: That this order is given subject to the acceptance of Russell & Co., and that no promises, whether of agent, of employee or of attorney, in respect to the payments, and security, or the working of the machinery named, will be considered binding unless made in writing, ratified by the home or branch office." Now, it can scarcely be said that a waiver of notice or promise to make continued effort to put the machinery in such condition that it would do the work for which it was sold or a promise that in case they were not successful they would substitute a new machine would fall within the prohibition of the foregoing clause of the contract. The only purpose of notice is to enable the vendor to examine the machinery and remedy any defects and put it in running order. When that purpose has been served and the company's agents have taken charge of and examined and worked on the machinery, it becomes immaterial whether any notice at all has been given. (*Massachusetts Loan & Trust Co. v. Welsh*, 47 Minn. 183, 49 N. W. 740; *Davis v. Robinson*, 67 Iowa, 355, 25 N. W. 282; *Nichols & Shepard Co. v. Wiedemann*, 72 Minn. 344, 75 N. W. 208, 76 N. W. 41; *Aultman-Taylor Co. v. Frazier*, 5 Kan. 202, 47 Pac. 156; *Baker v. Nichols & Shepard Co.*, 10 Okla. 685, 65 Pac. 100.) If, on the other hand, it should be contended that this clause was an attempt to restrict and limit the future power and authority of the corporation to modify its contract or waive any privilege given it under the contract through its duly constituted agents and attorneys,

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then and in that case it would come in conflict with the almost uniform current of authority which holds such stipulations invalid and of no binding force or effect. (*Baker v. Nichols & Shepard Co.*, 10 Okla. 685, 65 Pac. 100; *Nichols & Shepard Co. v. Wiedemann*, 72 Minn. 344, 75 N. W. 208, 76 N. W. 41; *Massachusetts Loan & Trust Co. v. Welch*, *supra*; *Lamberton v. Insurance Co.*, 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222; *Knickerbocker Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689.)

We have no way of knowing from this record what the appellants, the purchasers of this machinery, can in fact prove with reference to these several transactions, but it is to be presumed for our present purposes that they had evidence to establish, or at least tending to establish, some of the facts which their counsel offered to prove in the trial court, and for that reason a new trial must be granted in order to give them an opportunity of submitting these facts to the jury. In the view we take of the case, plaintiffs should be allowed to submit to the jury any competent evidence they may have tending to establish the fact that notice was waived and also the fact, if it exists, that it was impossible for them to use or test the machinery for any given length of time after they received it at the defendant's warehouse, and if the plaintiffs furnish *prima facie* evidence tending to establish these facts, then they would be entitled to show the further transactions between them and the defendant's agents, and their promises and agreements with reference to the repairs and work upon the machinery in order to make it run, and the exchange of machinery and the like in connection therewith. Counsel for defendant objected to evidence of the acts and statements of the agents on the grounds that plaintiffs had not proven the authority of the agents to bind the company. Whatever the original authority of the agent may have been, it would seem clear that his acts were ratified and confirmed by the company subsequently furnishing the purchasers another machine through the agency and medium of this salesman. They appear to have taken the first machine back and delivered a second machine under the original contract and this

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case arises over the delivery of the third or Buck machine, plaintiffs claiming that it was furnished in place of the second and to make good the original contract. It is also argued by respondent that plaintiffs are estopped on the grounds that they continued to make payments on the notes given for the purchase price of the machinery. When all the evidence in the case is heard, this objection may or may not be well taken. If payments were made from time to time under the belief and with the promise and agreement that the machinery would be put in running order and made to do the work for which it was purchased, and such agreement was in fact never complied with, and no further waiver is shown by the purchasers, it would not amount to an estoppel against them; otherwise it might do so. Evidence of their dealings will determine the question.

The judgment is reversed and the cause remanded, with directions to the trial court to grant a new trial and admit in evidence the plaintiffs' further offer tending to establish the facts above suggested. Costs awarded in favor of appellants.

Stockslager, C. J., and Sullivan, J., concur.

(November 20, 1906.)

H. L. MEDBURY et al., Respondents, v. JOHN MALONEY et al., Appellants.

[88 Pac. 81.]

RECORD—MATTERS PASSED UPON—JURISDICTION.

1. Where the transcript fails to show the grounds of a motion passed upon by the trial court, the appellate court cannot review the action of the court upon such motion.

2. The appellate court will not pass upon and determine questions unless the record shows that such questions were passed upon and determined by the trial court, unless it be questions of jurisdiction.

(Syllabus by the court.)

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APPEAL from the District Court of the First Judicial District for Kootenai County. Hon. Ralph T. Morgan, Judge.

Action on account brought before justice of the peace and appealed to the district court, where judgment was affirmed for the plaintiffs. *Judgment affirmed.*

John A. Steinlein, for Appellants.

Edwin McBee, for Respondents

Counsel cite no authorities on points decided.

SULLIVAN, J.—This action was commenced before a justice of the peace in Bonners Ferry precinct, Kootenai county. The defendants, who are appellants here, appeared and moved for a change of venue on account of the bias and prejudice of the justice of the peace. Said motion was granted and the case transferred to a justice of the peace in Naples precinct in said county. Thereafter appellants filed a motion to dismiss the action on the ground that the court had no jurisdiction, for the reason that said action was not brought in the precinct where the defendants or either of them resided, or where the contract sued on was to be performed. Said motion to dismiss was denied and defendants did not further appear, but failed and refused to make any answer therein. The plaintiffs thereupon introduced evidence on their behalf, and judgment was rendered and entered in their favor for the sum of \$104.65 and costs of suit. Thereafter the defendants served their notice of appeal and stated therein that the appeal was “taken on both questions of law and fact.”

The case came on for hearing in the district court, and there is nothing in the transcript showing what occurred there except the order of the court, which is as follows:

“This cause having been heretofore argued and submitted to the court and taken under advisement, now at this time,

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the court being fully advised, the motion of the appellants herein to remand this cause to the justice court is hereby denied and the judgment entered herein by F. B. Bond, justice of the peace of Naples precinct, on the fourth day of August, 1905, is hereby confirmed and affirmed;

“Wherefore, it is ordered, adjudged and decreed that the said plaintiffs, H. L. Medbury and John O’Hogge, do have and recover of and from the said defendants John Maloney and Nellie Maloney the sum of one hundred and four dollars (\$104), with interest at the rate of seven per cent per annum from October 1, 1904, and the costs of this action taxed at ——— dollars.”

It is recited in said order that the cause was argued and submitted on the motion of the appellants to remand the cause to the justice court and that such motion was denied and judgment entered. The record fails to show the grounds of the motion to remand. In the briefs of counsel, however, it is conceded that the court passed upon two questions. One was as to the jurisdiction of the justice of the peace who tried the case, and the other was as to defendants’ right to appeal and answer in the district court when he was in default for want of answer in the justice court. But there is no intimation in the record that the court passed on either of those questions. On appeal this court will only pass upon and determine questions that the record shows were passed upon by the trial court, and questions of jurisdiction of the court from which the appeal is taken. The only question passed upon by the trial court, so far as the record shows, was the motion of appellants to remand the cause to the justice court, and as the record fails to show the grounds for that motion, this court is unable to determine whether the court erred or not.

The judgment of the trial court is affirmed, with costs in favor of the respondents.

Stockslager, C. J., and Ailshie, J., concur.

Points Decided.

ON PETITION FOR REHEARING.

(January 2, 1907.)

Per CURIAM.—Appellants have filed a petition for a rehearing in this case, which we have examined, and find that it does not present any new question or matter not considered by the court prior to filing the opinion herein. The petition is denied.

(November 24, 1906.)

EMMA ADAMS et al., Appellants, v. BUNKER HILL AND SULLIVAN MINING COMPANY, a Corporation, Respondent.

[89 Pac. 624.]

NONSUIT—SHOULD ONLY BE SUSTAINED WHEN.

1. A nonsuit should only be granted when the evidence wholly fails to support the demand of plaintiff.

2. Where the evidence shows that a part of machinery of respondent was in a damaged condition, and that by reason thereof an employee in the discharge of his duty could become entangled in such machinery and lose his life or suffer great bodily injury through no fault of his, it is a *prima facie* case, and it is error to sustain a motion for nonsuit.

(Syllabus by the court.)

APPEAL from District Court of the First Judicial District for Shoshone county. Hon. Ralph T. Morgan, Judge.

Plaintiffs commenced their action to recover \$40,000 damages for the loss of life of the husband and father. At the close of the evidence for plaintiffs a motion for nonsuit was sustained and judgment for costs against plaintiffs. The appeal is from an order overruling a motion for a new trial. *Reversed.*

Argument for Appellants.

F. C. Robertson, Harry Rosenhaupt, Fred Miller and H. P. Knight, for Appellants. .

The instinct of self-preservation and the disposition of men to avoid personal harm re-enforce an inference that a person killed or injured was in the exercise of ordinary care. (16 Cyc. of L. & Pr. 1056; *Texas & C. Ry. Co. v. Gentry*, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104; *Choctaw O. & G. C. Co. v. McDade*, 191 U. S. 64, 48 L. ed. 962, 24 Sup. Ct. Rep. 24; *Milwaukee N. Y. & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256.)

Knowledge of the risk of the danger to which deceased was exposed is not to be presumed in proof of contributory negligence, but must be brought home to the employee. (*Missouri Pac. R. R. Co. v. Lemberg*, 75 Tex. 61, 12 S. W. 838; *Smith v. Peninsular Car Works*, 60 Mich. 501, 1 Am. St. Rep. 542, 27 N. W. 662; *Wabash R. R. Co. v. McDaniel*, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932.)

It is the province of the jury to determine as to the defendant's negligence under the facts in this case. (*Sioux City & Pacific R. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; Labatt on Master and Servant, 330, and cases cited.)

In the absence of proof that the deceased was guilty of negligence, the jury was authorized to infer the want of any from the circumstances of the case, and the disposition of men to take care of themselves and keep out of difficulty may be taken into consideration by the jury. (*Wash. & G. R. Co. v. Gladmon*, 15 Wall. (82 U. S.) 401, 21 L. ed. 114.)

In civil cases it is sufficient if the evidence agrees with and supports the hypothesis which it is adduced to prove, and it is not necessary that it should exclude other hypotheses in order to enable the plaintiff to recover, but the case should be submitted to the jury, and the jury should decide according to the reasonable probability of the truth. (Greenleaf on Evidence, 5th ed., sec. 13a; *Union Stockyards Co. v. Conoyer*, 41 Neb. 617, 59 N. W. 950; *Scheopper v. Hancock Chemical Co.*, 113 Mich. 582, 71 N. W. 1081; *Woods v. Chicago Ry.*

Argument for Respondent.

Co., 108 Mich. 396, 66 N. W. 328; *Western Travelers' Acc. Assn. v. Holbrook*, 65 Neb. 469, 91 N. W. 276, 94 N. W. 816; *Barnowski v. Helson*, 89 Mich. 523, 50 N. W. 989, 15 L. R. A. 33; *Lillstrom v. Northern Pac. R. R. Co.*, 53 Minn. 464, 55 N. W. 624, 20 L. R. A. 587; *Philadelphia etc. R. R. Co. v. Huber*, 128 Pa. St. 63, 18 Atl. 334, 5 L. R. A. 439; *Portland Min. Co. v. Flaherty*, 111 Fed. 312, 49 C. C. A. 361; *Pruke v. South Park Foundry Co.*, 68 Minn. 305, 71 N. W. 276; *Indianapolis P. & C. Ry. Co. v. Collingwood*, 71 Ind. 476; *Miller v. Inmen & Co.*, 40 Or. 161, 66 Pac. 713; *Hays v. Galligher*, 72 Pa. St. 136; *Indianapolis P. & C. Ry. Co. v. Thomas*, 84 Ind. 197.)

The proximate cause of an injury is ordinarily a question for the jury. It is to be determined as a fact in view of all the circumstances attending it as shown by the evidence. (*St. Louis etc. Ry. Co. v. Needham*, 69 Fed. 823, 16 C. C. A. 457; *Armour v. Hahn*, 111 U. S. 318, 28 L. ed. 440, 4 Sup. Ct. Rep. 433.)

M. A. Folsom and A. H. Featherstone, for Respondent.

In order to entitle plaintiff to recover for personal injuries, or to recover for the death of one owing the duty of support to plaintiff, it must be shown affirmatively that defendant has been guilty of negligence which resulted in such injuries or death. (*Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 661, 663, 45 L. ed. 361, 21 Sup. Ct. Rep. 275.)

The rule requiring the master to supply safe machinery and keep it in reasonable repair does not apply to the defects arising which are not of a permanent character, and do not require the help of skilled mechanics to repair, but which may easily be and usually are remedied by the workmen, and to repair which proper and suitable materials are supplied; there is no duty resting on the master to inspect during their use those common tools and appliances with which every one is conversant. (*Creagan v. Marston*, 126 N. Y. 568, 22 Am. St. Rep. 854, 27 N. E. 952; *Whittaker v. Bent*, 167 Mass.

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588, 46 N. E. 121; *Wachsmuth v. Shaw Elec. Co.*, 118 Mich. 275, 76 N. W. 497; *Garrigan v. Falls River Co.*, 158 Mass. 596, 33 N. E. 652.)

The testimony shows that Adams frequently stopped the machinery and tightened the loose rivets, and that it was his particular duty to supervise the machinery and see that it was in proper repair. If there were defects in the belt, there could be no recovery. (*Bedford Belt Co. v. Brown*, 142 Ind. 659, 42 N. E. 359; *McDermott v. Iowa Falls Co.*, 85 Iowa, 181, 52 N. W. 181; *Beckman v. Consol. Coal Co.*, 90 Iowa, 252, 57 N. W. 889; *Conroy v. Clinton*, 158 Mass. 318, 23 N. E. 527; *Johnson v. Hovey*, 98 Mich. 343, 57 N. W. 172; *Jennings v. Iron Bay Co.*, 47 Minn. 111, 49 N. W. 685; *Maes v. Tex. & N. O. R. Co.* (Tex. Civ. App.), 23 S. W. 725; *Minty v. Union Pac. Co.*, 2 Idaho, 471, 21 Pac. 660.)

Adams knew of the conditions and assumed the risk. No principle of law is better settled in this state than the principle that workmen assume the risk of dangers known to them, or which by ordinary care they might have known. (*Drake v. Union Pac. R. Co.*, 2 Idaho, 487, 21 Pac. 560; *Haner v. Northern Pacific Ry. Co.*, 7 Idaho, 13, 35 Pac. 700, 122 L. R. A. 725; *Holt v. Railway Co.*, 4 Idaho, 443, 40 Pac. 56.)

The following cases illustrate the principle that a workman with little experience assumes the risk of ordinary defects: *Connelly v. Eldredge*, 160 Mass. 566, 36 N. E. 469; *Wilson v. Mass. Cotton Mills*, 169 Mass. 67, 47 N. E. 506; *Sanborn v. Atchinson Ry. Co.*, 35 Kan. 292, 10 Pac. 1860; *Probert v. Phipps*, 149 Mass. 258, 21 N. E. 370; *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. 654.

STOCKSLAGER, C. J.—Plaintiffs commenced their action in the district court of Shoshone county, alleging the death of Richard Adams on the thirtieth day of November, 1902, while in the employ of defendant corporation, and that his death was the result of the faulty construction and operation of a certain belt used for conveying the ore in the mill or concentrator of defendant, and the careless and negligent

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use of such belt. It is alleged that said Richard Adams was the husband of plaintiff, Emma Adams, and the father of Ellen C. Adams and Virgil F. Adams, minors. The prayer of the complaint is for \$10,000 and costs.

A demurrer was filed to the complaint which is not shown by the record to have been disposed of; hence we assume it was withdrawn, as an answer was filed denying all allegations of the complaint as to negligence on the part of defendant in the equipment or maintenance of the belt and other machinery connected with said concentrator, or that the cause of the death of said Richard Adams was in any way traceable to the condition of the belt or defendant's negligence or carelessness in any manner. On the issues thus joined a jury was impaneled, and when plaintiffs had submitted their evidence a motion for nonsuit was interposed as follows:

"1. Because the plaintiffs have failed to prove a sufficient case for the jury.

"2. Because the plaintiffs have failed to show that defendant was guilty of any negligence causing the death of Richard Adams.

"3. Because the undisputed evidence shows that Richard Adams, deceased, knew the danger or, by the exercise of ordinary care, could have known of the danger and assumed the risk.

"4. Because the undisputed evidence fails to show that the death of Richard Adams was not caused by obvious defects in the machinery used by him, or from hazard incident to the business, or from causes known to exist by him, or which he might have known by the exercise of ordinary care."

The motion was sustained by the court, a judgment entered for costs in favor of defendant, a motion for a new trial was overruled and the appeal is from the judgment. The errors assigned are as follows: 1. That the decision is against law; 2. Errors of law occurring at the trial and excepted to by the plaintiffs; 3. Accident and surprise which ordinary prudence could not have guarded against.

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The only question presented by the record for our determination is whether the evidence was sufficient to support a judgment on the findings of the jury in favor of the plaintiffs in case they so found on the proofs before them. Appellate courts do not favor nonsuits; the trend of modern decisions is to discourage them. An analysis of the evidence in this case as shown by the record discloses the following facts:

Deceased was employed by defendant as a guard to protect its property at different times. He was not what is termed a practical millman, was not foreman of the concentrator at the time of the accident, did not have charge of the repair of the machinery, such work being under the control of the foreman. It was usually repaired at noon or between shifts. Mr. Adams' duty was to place rosin on the belt to keep it from slipping when it was heavily loaded. The belt was used for carrying ore from the ore bins into the concentrator and to prevent the spouts from filling up. Charles LaFevere testified that at the time of the accident the belt was not in good condition. "It had been torn in one place for about seventy feet." It was shown that bolts would become loose in the belt, and this condition could not be detected when the machinery was in operation. There were no eye-witnesses to the accident that resulted in the death of Mr. Adams. It is shown, however, by the evidence of Mr. LaFevere that he saw the body after death. He says: "When I was notified he was killed he had gone around the pulley and was lying on the other side; his head was in the pulley like, and his body was pushed up against the timber." By another witness it was shown that portions of cloth that resembled his sweater or jumper were taken from the bolts in the belt. There was other evidence introduced as to the character of the belt and the danger from the loose bolts when the machinery was in operation to anyone who attempted to supply the rosin to keep the belt from slipping when heavily loaded. We are of the opinion that the motion for nonsuit

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should have been denied. (*Later Bros. v. Hayward, ante*, p. 78, 85 Pac. 494, and cases cited.)

The judgment is reversed with costs to appellants.

Ailshie, J., and Sullivan, J., concur.

ON REHEARING.

(April 13, 1907.)

PERSONAL INJURY—NEGLIGENCE OF MASTER—DEATH OF SERVANT—PRESUMPTIONS AS TO FREEDOM OF SERVANT FROM NEGLIGENCE.

1. In an action against the master for damages caused by the death of the servant as a result of the master's negligence, the presumptions which arise in favor of the instincts of self-preservation and the known disposition of men to avoid injury and personal harm to themselves, constitute a *prima facie* inference that the servant was at the time in the exercise of ordinary care, and was himself free from contributory negligence. In case where the injury complained of resulted in the death of the injured person, the law presumes that such person exercised the measure of care which it was his duty to exercise.

2. Where the evidence in a personal injury case is so uncertain as to leave it equally clear and probable that the injury resulted from any one of a number of causes that might be suggested, then and in that case a verdict for plaintiff would be pure speculation and could not be sustained; but where the evidence, although circumstantial, is such that it would appear possible that the injury resulted from any one of several causes, and yet it points to the *greater* probability that it resulted from the specific cause charged by the plaintiff, a nonsuit should not be granted. In the latter case the jury would be justified in returning a verdict in favor of the plaintiff, although it be *possible* that the injury may have resulted from some other cause. The law does not anticipate or attempt to exclude mere possibilities.

3. If, upon any fair construction that a reasonable man might put upon the evidence, or any inference that might reasonably be drawn therefrom, the conclusion of negligence can be arrived at or justified, then the defendant is not entitled to a nonsuit, but the question of negligence should go to the jury.

4. Where it does not appear that the inspection and repair of the machinery with which the servant was working was a part of the servant's employment, and it also appears that the master was in a more favorable position to know its condition and to inspect and

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repair it, and the disrepair and unsafe condition of the machinery is shown, and was not obvious to the servant, and injury resulted therefrom, and the servant was not familiar with or accustomed to such machinery, and this was known to the master, such facts make a *prima facie* showing of negligence on the part of the master.

(Syllabus by the court.)

F. C. Robertson, Harry Rosenhaupt, Fred Miller and H. P. Knight, for Appellants.

M. A. Folsom, A. H. Featherstone and J. H. Forney, for Respondent on rehearing.

AILSHIE, C. J.—A rehearing was granted in this case and after hearing further argument and again examining the record, as well as the authorities cited, we are satisfied that the conclusion of the court was correct on the former hearing.

The principal contentions made by respondent on the rehearing are that if the injury was caused by any lack of repair of the machinery or a defect in the instrumentalities about which deceased was employed, the defect was so patent and obvious as to put the employee on notice and furnish him with knowledge of the dangers to which he was subjected, and that he was therefore chargeable with notice and assumed the risk.

The other contention is that the plaintiff has failed to show the injured servant's freedom from contributory negligence, and that the burden of establishing that fact rests upon plaintiff.

In the argument of the latter proposition, counsel have called our attention to a number of decisions from this state which they claim furnish a long line of authority to the effect that plaintiff, in order to recover in an action like this, must not only establish the fact that he was injured and that the injury was suffered while in the employ of the defendant, and that such injury was the result of the negligence of the defendant; but must also show that his own imprudence

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or negligence did not contribute to the result. The cases that counsel claim establish this doctrine and have accordingly been impliedly overruled by our decision in the present case, are as follows: *Drake v. Union Pac. Ry. Co.*, 2 Idaho, 497, 21 Pac. 560; *Minty v. Union Pac. Ry. Co.*, 2 Idaho, 471, 21 Pac. 660; *Harvey v. Alturas G. & M. Co.*, 3 Idaho, 510, 31 Pac. 819; *Zienke v. Northern P. Ry. Co.*, 8 Idaho, 54, 66 Pac. 828; *Holt v. Spokane Ry. Co.*, 4 Idaho, 443, 40 Pac. 56; *Haner v. Northern Pac. Ry. Co.*, 7 Idaho, 305, 62 Pac. 1028.

It must be conceded that there is language in some of the foregoing cases which has been employed by the court, apparently upon the assumption that the rule of law is as claimed by the respondent. In *Minty v. Union Pac. Ry. Co.*, *supra*, the court said: "The servant in order to recover for an injury takes the burden upon himself of establishing negligence on the part of the master and due care on his own part, and he is met with two presumptions, both of which he must overcome in order to entitle him to a recovery," etc. In *Holt v. Spokane Ry. Co.*, *supra*, the court quoted the following from *Lehman v. City of Brooklyn*, 29 Barb. 234, with seeming approval: "To entitle plaintiff to recover, it must appear affirmatively that the accident resulted wholly from the negligence of the defendant, and that the negligence or imprudence of the plaintiff did not contribute to the result," and in concluding the discussion of that phase of the case, this court, in speaking of the plaintiff's showing, said: "He has failed to show negligence on the part of the defendant, and has failed to show that negligence on his part did not contribute to the death of the child." Counsel for respondent have, however, seemed to overlook the case of *Hopkins v. Utah Northern Ry. Co.*, 2 Idaho, 300, 13 Pac. 343. That case really appears to be the only one from this court in which the question was squarely presented to the court to determine upon whom rests the burden of proof of contributory negligence. In passing upon that point, Mr. Justice Broderick, speaking for the court, said: "But it is contended that, even though the defendant was negligent, the plaintiff, by the

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carelessness of his servant who was at the time in charge of the team, contributed to the result and injury, and that, therefore, the defendant is not liable. In this case the burden was on the plaintiff to prove, in the first instance, that his property was injured and destroyed, for which he seeks redress, and that such injury was done by the locomotive of the defendant at or about the time and place charged in the complaint, and that such injury was the result of negligence of the agents and servants of the defendant. These facts proven, with the amount of damages sustained, made a *prima facie* case for the plaintiff. Then the burden shifted to, and was cast on, the defendant to overcome the case made by the plaintiff, by showing that the agents and servants of the defendant were on this occasion exercising due care and caution; or, if it relied on such contributory negligence of the plaintiff or his agent as to prevent a recovery of judgment by plaintiff, that was a defense to be proven and established by defendant. (*Railway Co. v. Gladmon*, 15 Wall. 401, 21 L. ed. 114; *Railroad Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898.) We are aware that there has been a contrariety of opinion on this question, but we are entirely satisfied with the rule as settled by the above-cited authority."

It will be observed that in the foregoing case the court cites *Railway Co. v. Gladmon* with approval. In the latter case, Mr. Justice Hunt, speaking for the supreme court of the United States, said: "The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurring negligence, the defendant must prove them, and thus defeat the action. Irrespective of statute law on the subject, the burden of proof on that point does not rest upon the plaintiff. (*Oldfield v. New York & Har. R. R. Co.*, 3 E. D. Smith, 103, affirmed, 14 N. Y. 310; *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65, 75 Am. Dec. 375; *Button v. Hudson River R. R. Co.*, 18 N. Y. 248; *Wilds v. Hudson River R. R. Co.*, 24 N. Y. 430.) In the case first cited, Denio, J., says: 'I am of opinion that it

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is not a rule of law of universal application that the plaintiff must prove affirmatively that his own conduct, on the occasion of the injury, was cautious and prudent. The *onus probandi*, in this as in most other cases, depends upon the position of the affair as it stands upon the undisputed facts. Thus if a carriage be driven furiously through a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover, though there were no witnesses of his actual conduct. The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of defendant's conduct would create so strong a probability that the injury happened through his fault that no other evidence would be required. . . . The culpability of the defendant must be affirmatively proved before the case can go to the jury, but the absence of any fault on the part of the plaintiff may be inferred from circumstances; and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration.' "

In volume 7 of Rose's Notes on United States Reports, at page 910, will be found a list of the numerous cases, both state and federal, that have cited *Railway v. Gladmon* with approval, following the doctrine that the "burden of proving contributory negligence rests on the defendant." Even if the rule were as contended for by respondent, which we think is not the case, there is another and somewhat kindred rule quite generally recognized, the application of which is decisive of the contention urged in this particular case. Here the employee was killed and there were no eye-witnesses to the occurrence, and there was no one to testify to anything other than physical facts and appearances and surrounding and concurring circumstances.

If it were conceded that the burden of proving freedom from contributory negligence rests upon the plaintiff, still in a case where the injury resulted in the death of the employee, and his legal representatives are prosecuting an action for damages, when they have established the fact of his death

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and that it resulted from the negligence of the defendant, they may then rest upon a legal presumption which at once arises in favor of life and the instincts of self-preservation. In other words, the law should and will presume that a sane man will exercise reasonable care and precaution in the preservation of his life, and that he will not knowingly expose or subject himself to those injuries and risks that he might reasonably expect would inflict mortal injuries.

In 16 Cyclopaedia, 1057, the author in discussing "presumptions," under the subject of *Evidence*, says: "The instinct of self-preservation, and the disposition of men to avoid personal harm, re-enforce an inference that a person killed or injured was in the exercise of ordinary care." The author cites in support of this text *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *Atchison etc. Ry. Co. v. Hill*, 57 Kan. 139, 45 Pac. 581; *Connerton v. Delaware etc. Canal Co.*, 169 Pa. St. 339, 32 Atl. 416; *Texas etc. R. Co. v. Gentry*, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104.

In *Denver Tramway Co. v. Reid*, the supreme court of Colorado approved the following instruction to the jury: "In arriving at a conclusion as to whether the plaintiff was guilty of contributory negligence at the time of the happening of the accident, you may take into consideration the natural instinct of self-preservation; that any person, under ordinary conditions, will take care of himself from regard for his own life."

In *Connerton v. Canal Company*, the supreme court of Pennsylvania said: "In case where the injury complained of results in the death of the injured person, the law presumes that such person exercised the measure of care that it was his duty to exercise. The presumption is *prima facie* only, and may be rebutted by proof of the acts of the injured person or of the circumstances surrounding the accident."

In *Texas Pac. R. Co. v. Gentry*, the plaintiff wholly failed to prove that the deceased was free from negligence in attempting to cross a railway track in front of a moving train,

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and it was contended by the company that the plaintiff had failed to make out his case by reason of having failed to show the deceased's freedom from contributory negligence. Justice Harlan in speaking for the supreme court of the United States, said: "As already stated, no one personally witnessed the crossing of the track by the deceased nor the running of the flat car over him. Whether he did or did not stop and look and listen for approaching trains the jury could not tell from the evidence. The presumption is that he did; and if the court had given the special instruction asked, it would have been necessary to accompany it with the statement that there was no evidence upon the point, and that the law presumed that the deceased did look and listen for coming trains before crossing the track." To the same effect, see *Greenleaf v. Illinois Central Ry. Co.*, 29 Iowa, 14, 4 Am. Rep. 193; *Allen v. Willard*, 57 Pa. St. 380; 1 Labatt on Master and Servant, sec. 330.

Counsel for respondent place great reliance on *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 661, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, and call our special attention to the following quotations from that case: "The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. In the latter case, it is not sufficient for the employee to show that the employer may have been guilty; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for one of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for

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the unfortunate victim of an accident justifies any departure from settled rules of proof upon the plaintiffs.”

The foregoing extract is in no respect in conflict with the general line of authorities as hereinbefore cited and many others in harmony therewith. It must be readily admitted that where the evidence in a case of this kind is so uncertain as to leave it equally clear and probable that the injury resulted from any one of “half a dozen causes,” then a verdict for plaintiff would be pure speculation, and could not be sustained, but it may be true that the evidence would leave it *possible* that the injury resulted from any one of several causes, and yet it would at once point to the *greater probability* that it resulted from the one certain, specific cause charged by the plaintiff. In the latter case, the jury would be justified in returning a verdict in favor of the plaintiff, although it be possible that the injury may have resulted from some other cause. There are very few things in human affairs, and especially in litigation involving damages, that can be established to such an absolute certainty as to exclude the *possibility*, or even some *probability*, that another cause or reason may have been the true cause or reason for the damage rather than the one alleged by the plaintiff. But such *possibility*, or even *probability*, is not to be allowed to defeat the right of recovery where the plaintiff has presented to the jury sufficient facts and circumstances surrounding the occurrence as to justify a reasonable juror in concluding that the thing charged was the prime and moving cause. As said by the court in *Texas & Pac. Ry. Co. v. Gentry*, *supra*: “When a given state of facts is such that reasonable men may reasonably differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court.”

In the syllabus to *Sioux City & Pac. R. R. Co. v. Stout*, 17 Wall. (84 U. S.) 657, 21 L. ed. 745, it is said: “If upon

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any construction which the jury is authorized to put upon the evidence, or by any inference they are authorized to draw from it, the conclusion of negligence can be justified, the defendant is not entitled to a nonsuit, but the question of negligence must be left to the jury."

The general outline as to the history and facts of this case is given in the original opinion. From that it will be seen that the employee, Adams, was tending an ore conveyor in the mill of the Bunker Hill & Sullivan Mining Company, and that it was his duty to watch the belt and keep rosin on it so as to prevent its slipping on the pulleys. This belt was running on an incline of about forty-five degrees, and conveyed the ore from the lower part of the mill to the upper floor from which it was dumped into an ore chute. Adams was not accustomed to working about the concentrator or in the mill, and was neither experienced nor familiar with that kind of work, and the company's officers appear to have been aware of his inexperience in this class of work. He had worked in the mill only a short time prior to the accident. It is admitted that he was killed in defendant's mill and while engaged in its service. No one was present at the time of the accident, and it was therefore impossible for the plaintiff to produce any witnesses who could narrate the facts of the occurrence. The case depended entirely upon circumstances and the physical facts and conditions as they existed at the time he was last seen, and at the time his body was discovered in the machinery.

While, perhaps, no single fact or circumstance standing alone that has been shown by the plaintiff would justify the jury in saying that it alone established negligence on the part of the defendant, still when all the facts and circumstances that were shown are taken and considered together, they are sufficient to go to the jury. They made a *prima facie* case at least. The court may properly, and, in fact, should say when no facts have been established to support the plaintiff's case, but the court cannot say what facts and circumstances shall be believed and what may not be believed, nor

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can the court determine as to what conclusions a jury might reach from a certain state of facts and train of circumstances from which different conclusions might be reasonably reached by different minds.

In this case it does not appear that the nature of the service and employment required the servant to repair the belt or machinery with which he was working, nor does it appear that he was in an equally favorable position with the defendant for inspecting the machinery and instrumentalities with which he was working. The defendant had charge, control and management of its own mill and machinery, and had its day foreman and night foreman in charge. Adams' employment was on the night shift, and it was after dark when he went on duty. The place where his principal and most dangerous work was required was poorly lighted, there being only one electric lamp near him, and that hung over the belt, and the belting and ore carried thereon cast a shadow beneath and at the place where Adams was required to work and apply the rosin. From the evidence in the record, it appears that it would have been very difficult for him to have detected loose bolts or a damaged or defective condition in the belting. It also appears that the bolts were allowed to extend on the under side of the belting as much as three-fourths of an inch, and that immediately after the discovery of the dead body pieces of his sweater and clothing were found on the bolts and nuts, and that many of the nuts were loose and some of the bolts were bent. It also appears from the testimony of at least one witness that it was the custom of those in charge of the mill to have this machinery inspected and the nuts tightened between shifts either at noon or evening. It is shown that Adams helped tighten the nuts at least once previous to the accident, but it does not appear that this was in the line of his duty or a service for which he was employed.

It has been argued by respondent's counsel that Adams' death may have been the result of any one of a number of causes; that he may have been thrown in there by an enemy; that he may have committed suicide; that he may have been

Points Decided.

intoxicated and fallen in; that he may have been experimenting as to some different method of applying the rosin; and a great many other theories appear to have been advanced as an explanation of his death. While any of these theories are among the possibilities, nevertheless the complaint of the plaintiff and the answer of the defendant reduce the issue as to the cause of his death to one proposition, and that is set out in paragraph 7 of the defendant's answer. We quote therefrom as follows: "Defendant alleges that said Adams was killed through his own negligence in this: that he carelessly and negligently allowed himself to become entangled in the pulley while carelessly and negligently putting rosin on the said belt and pulley."

The plaintiff produced sufficient evidence to put the defendant on its defense and to entitle the case to go to the jury, and it was error for the trial court to grant a nonsuit. The judgment must be reversed, and it is so ordered and a new trial is granted. Costs awarded in favor of the appellants.

Sullivan, J., concurs.

Stewart, J., took no part in the decision.

(November 24, 1906.)

GEORGE L. ALLEN et al., Appellants, v. PHOENIX ASSURANCE COMPANY, Respondent.

[88 Pac. 245.]

**FIRE INSURANCE—APPLICATION FOR INSURANCE—PROOF OF LOSS—
WAIVER—SOLE OWNER IN FEE SIMPLE—ASSIGNMENT OF POLICY.**

1. Where the insurer relies on a condition subsequent incorporated in a policy of insurance to defeat the right of the insured to recover after loss, the insurer must specially plead such condition and breach thereof, and the plaintiff in an action to recover

Points Decided.

on the policy has a right to introduce evidence to rebut any proof of breach of condition so pleaded, or to show a waiver of the condition of the insurer.

2. Where the plaintiff in an action on an insurance policy makes a *prima facie* case establishing the fact of issuance and delivery of the policy and the payment of the premium thereon, the loss through and on account of the cause insured against, and the furnishing of notice and proofs to the insurer as required by the policy or the waiver thereof on the part of the insurance company, the case should go to the jury, and it is error for the trial court to grant a nonsuit.

3. Where an insurance company has sent its agent and adjuster to the place where the loss occurred to take the proofs and adjust the loss, and after examination and investigation by such adjuster he informs the insured that his company cannot, and will not, pay the loss, and places the refusal to do so on the grounds that the policy has been assigned and urges no other ground of objection whatever, and informs the insured that he has nothing further to do with the matter, and that they will have to deal directly with the company, and the company, on the other hand, through its home office, informs and advises the insured that the matter is still in the hands of their adjuster, who visited the premises, and the adjuster thereafter refuses to further negotiate or deal with the insured looking to an adjustment of the loss, such facts establish a sufficient *prima facie* case of waiver of proofs to entitle the same to go to the jury.

4. Where an insurance policy contains a clause providing that the policy shall be void "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple," and it is shown that the property insured was situated upon a government homestead owned and claimed by the insured in which the legal title remained in the United States government, and on which final proof was not made until after the loss by fire. *Held*, that there was not such a failure of title as to defeat the right of recovery under this stipulation as to ownership.

5. *Id.*—In such a case the sole and entire burden of the loss, in case of loss, falls upon the insured (the homesteader), and the government has no interest in the property destroyed, and suffers no loss on account thereof.

6. Where it is shown that the insured truthfully and correctly stated the nature and condition of his title in making his application for insurance, he will not be precluded from recovering in case of loss on account of a contrary statement as to title inserted in the policy by the underwriter.

Argument for Appellants.

7. Assignment or hypothecation of a policy of fire insurance of the face value of \$2,000 to a creditor, as collateral security for an extension of time on a debt of \$300, does not constitute or amount to an assignment of the policy in violation of the stipulation contained therein to the effect that the policy shall be void if "assigned before loss."

(Syllabus by the court.)

APPEAL from the District Court of the Second Judicial District for Nez Perce County. Hon. Edgar C. Steele, Judge.

Action by plaintiffs to recover upon a policy of fire insurance. Plaintiffs introduced their evidence and rested their case, whereupon the court granted a nonsuit on motion of defendant. Plaintiffs appeal from the judgment and from an order denying a motion for a new trial. *Reversed.*

Daniel Needham, for Appellants.

The facts as alleged in plaintiff's amended complaint and established by the evidence makes a strong *prima facie* case, and should have been submitted to the jury. (*Black v. City of Lewiston*, 2 Idaho, 276, 13 Pac. 80; *Kroetch v. Empire Mill Co.*, 9 Idaho, 277, 74 Pac. 868; *Idaho Milling Co. v. Kalanquin*, 7 Idaho, 295, 62 Pac. 925; *Kansteiner v. Clyne*, 5 Idaho, 59, 46 Pac. 1019; *Pearlstone v. Westchester Fire Ins. Co.*, 70 S. C. 75, 49 S. E. 4, and cases cited.)

Every ground set forth in defendant's motion for nonsuit is matter of defense, and plaintiffs were not called upon to meet the said separate defenses until they were proved, at least *prima facie*. (*Wallingford v. Columbia & G. R. Co.*, 26 S. C. 258, 2 S. E. 19.)

Upon a motion for nonsuit, everything will be deemed to be proved which the evidence tends to prove. (*Nord v. Boston & M. Con. Copper & Silver Min. Co.*, 30 Mont. 48, 75 Pac. 681; *State v. Benton*, 13 Mont. 306, 34 Pac. 301; *Later v. Haywood*, ante, p. 78, 85 Pac. 494.)

The evidence was sufficient to entitle the plaintiffs to a submission of the issues to the jury. (*Nute v. Hartford Fire Ins. Co.*, 109 Mo. App. 585, 83 S. W. 83.)

Argument for Appellants.

Waiver is a question of fact to be determined by the jury. (*Exchange Bank v. Thuringia Ins. Co.*, 109 Mo. App. 654, 83 S. W. 534; *Ehrlich v. Aetna Life Ins. Co.*, 88 Mo. 249; *Okey v. State Ins. Co.*, 29 Mo. App. 105; *Stiepel v. German etc. Ins. Co.*, 55 Mo. App. 224.)

We cite further on question of waiver the following: *McBride and Other v. Republic Fire Ins. Co.*, 30 Wis. 562; *Bellevue Roller Mills Co. v. London & L. Fire Ins. Co.*, 4 Idaho, 307, 39 Pac. 196; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693, 9 Am. Rep. 479; *Campbell v. American Fire Ins. Co.*, 73 Wis. 100-110, 40 N. W. 661; *Harriman v. Queen Ins. Co.*, 49 Wis. 71; *Lansing v. Commercial Union Assur. Co.*, 4 Neb. (Unofficial), 140, 93 N. W. 756; *King v. Hekla Fire Ins. Co.*, 58 Wis. 508, 17 N. W. 297; *Faust v. American Fire Ins. Co.*, 91 Wis. 158, 51 Am. St. Rep. 876, 64 N. W. 883, 30 L. R. A. 703.

The fact that the real estate was a homestead entry and final proof had not yet been made would not defeat the recovery of insurance on property situate thereon, provided the assured had an insurable interest therein. (*Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 25 Am. St. Rep. 191, 27 Pac. 738, 13 L. R. A. 475; *Grange Mill Co. v. Western Assur. Co.*, 118 Ill. 396, 9 N. E. 274; *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 43 Pac. 1115; *German Ins. Co. v. Gueck*, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835; *Kenton Ins. Co. v. Wiggington*, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81.)

If furnishing proofs of loss was material, after company denied all liability on other grounds, receiving such proofs and not returning same or objecting thereto is a waiver of that condition. (*Commercial Union Assur. Co. v. Hocking*, 6 Cent. Rep. 915, 115 Pa. St. 407, 2 Am. St. Rep. 562, 8 Atl. 589; *Martison v. North British & M. Ins. Co.*, 64 Mich. 372, 31 N. W. 291; *German Fire Ins. Co. v. Grunert*, 112 Ill. 69; *Titus v. Glens Falls Fire Ins. Co.*, 81 N. Y. 419; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 109, 28 Am. Rep. 535; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869; *Long Island Ins. Co. v. Great Western Mfg. Co.*, 2 Kan. App. 377, 42 Pac. 739; *Breedlove v. Norwich Union Fire Ins. Soc.*, 124 Cal. 164, 56 Pac. 770-772.)

Argument for Respondent.

Plaintiffs have never parted with title to said policy, but have always been the owners thereof.

The defendant cannot avoid liability under said policy on account of the indorsement thereon. (*Carroll v. Boston Marine Ins. Co.*, 8 Mass. 515; *Insurance Co. of Pennsylvania v. Phoenix Ins. Co.*, 71 Pa. St. 31; *Bidend v. L. & L. P. & L. Ins. Co.*, 30 Cal. 76; *True v. Manhattan Fire Ins. Co.*, 26 Fed. 83; *Ellis v. Kreutzinger*, 27 Mo. 311, 72 Am. Dec. 270; *Wakefield v. Martin*, 3 Mass. 558.)

James E. Babb, for Respondent.

The plaintiff proved the execution of the contract, and the defendant's cross-examination was germane in so far as it elicited circumstances to show that the contract never took effect. (*Austin v. Mutual Reserve Fund Assn.*, 132 Fed. 555; *Wilcox v. Continental etc. Ins. Co.*, 85 Wis. 193, 55 N. W. 188.)

A nonsuit was properly granted because the evidence showed that the plaintiffs had not either a sole nor an unconditional title, nor a fee simple title to the ground upon which the building stood. Plaintiffs had not, nor either of them, the legal title, nor had they any equitable title. (*In re Millers' & Manufacturers' Ins. Co.* (Minn.), 106 N. W. 485; *Waller v. Northern Assur. Co.*, 10 Fed. 232, 2 McCrary, 637; *Barnard v. National Fire Ins. Co. of Hartford*, 27 Mo. App. 26; *American Ins. Co. v. Barnett*, 73 Mo. 364, 39 Am. Rep. 517; *Clay Fire & Marine Ins. Co. v. Manufacturers' Co.*, 31 Mich. 346; *Aetna Ins. Co. v. Holcomb*, 89 Tex. 404, 34 S. W. 915; *Wilcox v. Continental Ins. Co.*, 85 Wis. 193, 55 N. W. 188; *Fox v. Queen Ins. Co.*, 124 Ga. 948, 53 S. E. 271.)

Plaintiff had no cause of action because of the chattel mortgage upon part of the insured property at the time of the issuance of the policy. This proposition depends for its force upon the condition of the policy providing that if such mortgage exist, without the consent indorsed upon the policy, the policy shall be void in its inception. (13 Am. & Eng. Ency. of Law, 2d ed., 258.)

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Under the provisions in this policy, information given to any agent of conditions of the title, or existence of a mortgage, would not save the policy from invalidity in the absence of an indorsement of the company's consent in writing upon the policy, in accordance with the terms thereof. (*Northern Assur. Co. v. Grandview Bldg. Assn.*, 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 132; *Deming Inv. Co. v. Shawnee Fire Ins. Co.*, 16 Okla. 1, 83 Pac. 918; *Pennsylvania Cas. Co. v. Bacon*, 133 Fed. 907, 67 C. C. A. 497.)

The assignment of the policy to John P. Vollmer was made to him absolutely and not by way of security, so far as appears from the language of the assignment, and it became necessary upon the assignment to him, nothing to the contrary being expressed in writing attached to the policy, that his interest should be a sole and unconditional title and fee simple title as to the real property. If the purpose were that his title should be that of mortgagee only, it should have been expressed in writing attached to the policy. (*Home Ins. Co. v. Allen*, 93 Ky. 270, 19 S. W. 743; *Wall v. Com. Ins. Co.*, 2 Wkly. Law Bul. (Ohio) 113; *Wall v. Amazon Ins. Co.*, 2 Wkly. Law Bul. 333, 7 Ohio Dec. 408; *Phoenix Ins. Co. v. Willis*, 70 Tex. 12, 8 Am. St. Rep. 566, 6 S. W. 825.)

The adjuster has no authority to waive the making of proofs of loss. (*Searle v. Dwelling-house Ins. Co.*, 152 Mass. 263, 25 N. E. 290; *Graves v. Merchants' Bankers' Trust Co.*, 82 Iowa, 637, 31 Am. St. Rep. 507, 49 N. W. 65; *Emanuel v. Maryland Casualty Co.*, 47 Misc. Rep. 378, 94 N. Y. Supp. 36.)

The sending of an adjuster to adjust the loss and an examination by him of the nature of the loss, and even of the parties upon oath, does not constitute a waiver of proofs of loss. The company has a right to make these examinations and investigations, and by express provision of this policy it is declared that such investigations and examinations shall not constitute a waiver. (*Holbrook v. Beloise T. Ins. Co.*, 117 Cal. 561, 49 Pac. 555; *Willoughby v. St. Paul Grain Ins. Co.*, 68 Minn. 373, 71 N. W. 272; *Phoenix Ins. Co. v.*

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Carnahan, 63 Ohio, 258, 58 N. E. 805; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 67 Am. St. Rep. 900, 44 S. W. 464, 34 L. R. A. 789; 13 Am. & Eng. Ency. of Law, 349; *Donough v. Farmers' F. Ins. Co.*, 104 Mich. 503, 62 N. W. 721; *Walsh v. Des Moines Ins. Co.*, 77 Iowa, 376, 42 N. W. 324; *Harrison v. Hartford F. Ins. Co.*, 59 Fed. 732; *Young v. St. P. F. & M. Ins. Co.*, 68 S. C. 387, 47 S. E. 681; *Missouri Pac. Ry. Co. v. Western Assur. Co.*, 129 Fed. 610; *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457, 48 Am. St. Rep. 454, 57 N. W. 952; *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698; *Lycoming County Ins. Co. v. Updegraff*, 40 Pa. St. 311.)

AILSHIE, J.—This case was taken from the jury on a motion for nonsuit on the submission of the plaintiffs' case. The appeal is from the judgment and from an order denying a new trial. The action was commenced for the recovery of the amount of loss sustained by the plaintiffs under a fire insurance policy issued by the defendant on certain of plaintiffs' property. On the trial the plaintiffs proved the issuance of the policy and introduced the same in evidence, and the payment of the premium thereunder and the loss of the property. Plaintiffs had alleged in their complaint a waiver by the defendant of the formal written proofs and inventory of loss as provided for and required in the policy. On the trial they proved that immediately after the fire they called up the defendant's local agent and notified him of the loss, and that soon thereafter defendant sent its adjuster, J. H. McKowan, from Spokane, Washington, to examine the conditions and adjust the loss. The adjuster went to the premises, questioned and examined the parties insured, and took some memoranda of the property lost and the dimensions and conditions of the building, and it seems that there was no difference between them as to the amount of the loss except as to the extent of damage done to an engine and boiler. When the adjuster got ready to leave the premises he demanded of the insured the policy, whereupon they informed him that it was in the office of John P. Vollmer at Lewiston. He inquired the reasons why it was there, and they informed

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him that they had been owing Mr. Vollmer \$300 for some time, and when the same became due they were unable to pay it, and that they went to see Mr. Vollmer and asked him to give them an extension of about six weeks, and that they gave him the policy as collateral security. Upon delivering the policy to Mr. Vollmer they indorsed their written assignment to him. It is alleged by the complaint that at the time of making this assignment it was understood and agreed between them and Mr. Vollmer that he should submit the assignment to the agent of the insurance company for the company's approval. Proof of this allegation does not appear from the evidence, and there seems to have arisen some controversy on the trial as to the admissibility of the evidence tending to show the transaction between the plaintiffs and Mr. Vollmer, and the court refused to allow plaintiffs to testify that they were the owners in fact and that they had been all the time the owners of the policy. Upon learning that the policy was in the possession of Mr. Vollmer, the adjuster seems to have assumed an air of independence, and informed the plaintiffs that he would have no further business with them. They requested him, however, to meet them the following day at Lewiston. They went to Lewiston the next day and Mr. Vollmer delivered them the policy. In the meanwhile the adjuster had been to Mr. Vollmer's, and seems to have examined the policy and also the assignment thereon, and when they saw him he told them he had seen the policy and found that they had assigned it, and that they had no further claim on it and that he could not pay them anything. He also told them as he was leaving the city, that since they had put their matter in the hands of an attorney he had no further business with it, and that they would have to settle with the company; and he appears to have also made further remarks to them with a view, apparently, of getting them to submit some offer of compromise. The plaintiffs' attorney seems to have thereafter written the head office in New York City concerning the matter, and in reply thereto received two letters from the office in San Francisco informing him that the

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matter was still in the hands of their agent and adjuster, Mr. McKowan, of Spokane, and that they had written him on the subject of this loss. This is the substance of the evidence produced by the plaintiffs. The defendant had denied the material allegations of the complaint, admitting the issuance of the policy, but denying that it ever went into force or effect or became a valid policy of insurance, and as a defense to the action set up some nine separate defenses, in each of which it was alleged that the insured had violated some clause, provision or restriction contained in the policy, and that as a consequence of such violation the policy had lapsed and the defendant was relieved from liability for the loss.

On cross-examination of plaintiffs' witnesses by defendant's counsel, evidence was brought out which showed, or at least tended to show, that at the time of the issuance of the policy and thenceforth until the loss by fire, the property insured was situated on a homestead claim owned by one of the plaintiffs, the title to which was at all times in the United States government, and that final proof was not made until in the summer after the fire. This, it is claimed, avoided liability by the insurer under the following clause contained in the policy: "This entire policy, unless otherwise provided by agreement indorsed hereon or added thereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be or become encumbered by chattel mortgage, . . . or if this policy be assigned before loss."

The plaintiffs made a sufficient case to go to the jury, and whatever evidence was disclosed to defeat plaintiffs' right of recovery or avoid the liability of the insurer was brought out on the cross-examination, and without considering or passing upon the proposition as to whether or not this was proper cross-examination, it is nevertheless true that all the evidence brought out on cross-examination was matter in support of

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the separate defenses pleaded by the company. All of these matters were of such a nature and character that they might have been waived by the company, and the plaintiffs were entitled to the opportunity of offering evidence in rebuttal thereof, or tending to show a waiver of the conditions and obligations pleaded as defenses. (*Pearlstine v. Westchester Fire Ins. Co.*, 70 S. C. 75, 49 S. E. 4, and cases cited.) On the other hand, it would be a somewhat novel practice to require a plaintiff, in making his case in chief, to rebut evidence brought out by the defendant on cross-examination which tended to support the separate defenses. The defendant recognized in this case what we conceive to be the correct rule of practice in preparing and filing its answer; namely, that where the insurer relies for its defense upon breach of condition enumerated in the policy, it must plead the condition, and its violation in defense of the action. (*American Cent. Ins. Co. v. Murphy* (Tex. Civ. App.), 61 S. W. 956; 19 Cyc. 926.) This is especially true of all conditions subsequent. On the other hand, the plaintiff must prove conditions precedent. (11 Ency. of Pl. & Pr. 422, 423.) In this case the plaintiffs had alleged a waiver of proofs of loss, and we think the evidence in support of that allegation was sufficient to entitle them to go to the jury. The defendant's adjuster went upon the grounds, and examined the conditions and made notes and took memoranda and questioned the insured, and finally left them by telling them that he could not pay them anything, and placed the refusal to pay solely upon the ground that they had assigned the policy. When plaintiffs' attorney wrote to the home office, he received notice from them that the matter was still in the hands of their adjuster. The adjuster, on the other hand, appears to have declined to further communicate or deal with them in any respect whatever. While the contract does not make it the duty of the insurer to furnish the insured with blanks for making proof of loss, it is nevertheless the uniform practice of insurance companies to do so, and yet neither the adjuster nor the company appear to have ever furnished the insured with

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any blanks for making proof of loss. It is true that this fact is not a matter that would constitute a waiver, yet it is a circumstance taken in connection with the action, conduct and statements of the adjuster as well as the home office of the company, that bears upon the apparent aims and purposes of the company. The insurer must be fair, and when relying on printed restrictions among the numerous limitations found in its policies must not so act with reference to one restriction as to mislead the insured as to its attitude or reliance on another. The evidence submitted by plaintiffs was sufficient to make a *prima facie* case of waiver of proofs of loss and to take the case to the jury. As touching the general principle, see *Scarle v. Dwelling-house Ins. Co.*, 152 Mass. 263, 25 N. E. 290; *California Ins. Co. v. Gracey*, 15 Colo. 70, 22 Am. St. Rep. 276, 24 Pac. 577; *Cobb v. Insurance Co.*, 11 Kan. 93; *Exchange Bank of Webb City v. Thuringia Ins. Co.*, 109 Mo. App. 654, 83 S. W. 534; 13 Am. & Eng. Ency. of Law, 2d ed., 344. In *Farnum v. Insurance Co.*, 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 874, the supreme court of California, in discussing waiver by insurer, said: "It is well settled by a long line of authorities that the denial of all liability upon other grounds is a waiver even of the condition requiring proofs of loss," and in support of this statement that court cites the following authorities: *Continental Ins. Co. v. Buckman*, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 259, 8 S. W. 453; *Norwich etc. Transp. Co. v. Western etc. Ins. Co.*, 34 Conn. 561, Fed. Cas. No. 10,363; *McBride v. Insurance Co.*, 30 Wis. 562; *Donahue v. Insurance Co.*, 56 Vt. 382; *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149, 4 Atl. 8; *Zielke v. Assurance Corp.*, 64 Wis. 442, 25 N. W. 436; *O'Brien v. Insurance Co.*, 52 Mich. 131, 17 N. W. 726; *Ball etc. Wagon Co. v. Aurora etc. Ins. Co.*, 20 Fed. 232; *Carroll v. Insurance Co.*, 72 Cal. 297, 13 Pac. 863.

It was held to the same effect in *Cobb v. Insurance Co.*, *supra*. Respondent contends, however, that since the evidence of plaintiffs themselves shows that the property insured

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was situated upon a government homestead, the title to which was in the United States, they have shown a breach of the conditions as to the title, and that plaintiffs were not entitled to recover. Now, in the first place, if this is held to be such a failure of title as to defeat the recovery, the plaintiffs would still be entitled to recover if that failure were not specially pleaded by the defendants and relied on as a defense; and since it must be pleaded as a defense, it is deemed denied under section 4217, Revised Statutes. Plaintiffs would therefore be entitled to the opportunity to rebut any evidence tending to establish such a defense or to show that the insurer had waived the condition, or was estopped from relying thereon. We do not think, however, that the fact of this property being situated on a government homestead, the legal title to which still rests in the government, is a failure of title such as contemplated by the stipulation in the policy relied on by the insurer. The purpose of the insurer inserting such a stipulation in the contract is to enable it to ascertain who is the real owner of the property and on whom the loss would fall in case of destruction of the property. Here no other person, either individual or corporate, has any interest whatever in the real estate. The plaintiffs had located and filed upon the property in compliance with the law, and had apparently taken all the steps necessary to acquire the legal title from the United States. The destruction of the property was no loss to the government. The sole and entire loss fell upon the insured (the homesteader). This clause is found in the policies of most companies, and has been employed by insurance companies for many years. We have examined a great many authorities wherein the courts have considered the purpose and effect of this clause requiring unconditional or fee simple title in the insured, and while insurance companies have been writing policies on property situated on government homesteads for nearly half a century, still our attention has not been called to a single case where an insurer has successfully pleaded such condition as constituting a breach of contract so as to defeat the recovery of the

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loss insured against. We have examined, however, several cases which by analogy and parity of reasoning sustain us in the view here expressed. (*Phoenix Ins. Co. v. Bawdre*, 67 Miss. 620, 19 Am. St. Rep. 326, 7 South. 596; *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 25 Am. St. Rep. 191, 27 Pac. 738, 13 L. R. A. 475; *Capital City Ins. Co. v. Caldwell Bros.*, 95 Ala. 79, 10 South. 355; 13 Am. & Eng. Ency. of Law, 2d ed., 231-233.)

In this case it does not definitely appear whether the insured made a written application for insurance or simply had a parol understanding with the agent who solicited the risk. If the title disclosed were held to be short of the requirement contained in the policy, still it would not defeat the right of recovery, if it could be shown that the insured, by their written application, truly and correctly represented the state and condition of the title to this property. In such case the insurer could not insert a contrary provision in the policy with knowledge of the true condition of the title, and thereby bind the insured and defeat his right of recovery in case of loss. (*Nute v. Hartford Fire Ins. Co.*, 109 Mo. App. 585, 83 S. W. 83; *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614; *In re Millers' & Manufacturers' Ins. Co.* (Minn.), 106 N. W. 492; *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 43 Pac. 1115; *Germania Fire Ins. Co. v. Hick*, 125 Ill. 361, 17 N. E. 792.)

It is contended by the respondent that the insured had assigned their policy in violation of the stipulation therein against assignment, and that for that reason they could not recover. Upon the trial the plaintiffs were in possession of the policy and produced it in evidence. The possession of the policy by the party named therein as the insured is of itself *prima facie* evidence of ownership. Being the parties insured, and being in possession of the policy, they had a right to introduce any evidence they had, either written or parol, tending to explain the written assignment contained on the back of the policy, and to show that they were in fact the real owners of the policy, and had always been such. The

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evidence they were permitted to introduce tended to show that they had never ceased to be the real owners of the policy, and that the only interest of the assignee therein named was merely such an interest as the holder of collateral security acquires in the thing given as security—a mere equity. The legal title remained in the insured. This would not constitute an assignment in violation of the stipulation contained in the policy. (*Ellis v. Kreutzinger*, 27 Mo. 311, 72 Am. Dec. 270; *True v. Manhattan Fire Ins. Co.*, 26 Fed. 83; 19 Cyc. 637; *Griffey v. New York Cent. Ins. Co.*, 100 N. Y. 417, 52 Am. Rep. 202, 3 N. E. 309; 2 May on Insurance, sec. 379.)

There was disclosed on cross-examination some evidence tending to show that a part of the personal property covered by the insurance had been mortgaged prior to the application for insurance. The evidence, however, on this point is too vague, uncertain and indefinite to enable us to consider or discuss it. The plaintiffs will have a right to meet and rebut such evidence, and that after they have heard the defendant's case. It is enough to say that it was not sufficient to defeat the plaintiffs' right of recovery or to take the case from the jury. Upon that issue, when the defendant attempts to establish it, will arise the nature and character of the statements or representations made by the insured at the time of their application for insurance, and the character and extent of knowledge the insurers obtained on the subject prior to writing the policy; also the question of the character of the lien or encumbrance, and the validity and effect thereof, and kindred subjects which have been discussed in many cases bearing on that phase of the insurance law. (*Allensina v. London & L. & G. Ins. Co.*, 45 Or. 441, 78 Pac. 392; 13 Am. & Eng. Ency. of Law, 2d ed., 258.) A great many phases of the law that may become applicable to this case upon a retrial thereof have been very ably and exhaustively considered in respondent's brief, as also in the brief of appellant. But the case having come to this court on a judgment of nonsuit in the lower court, we are left by the record in such a position that we cannot consider or pass

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upon many of these matters. Many of these questions must depend entirely for their application upon the particular facts disclosed. We have passed upon all the questions the record discloses, and the case will necessarily have to be remanded for a new trial. The judgment of the lower court is reversed and the cause remanded, with instruction to the trial court to grant a new trial and proceed in accordance with the views herein expressed. Costs awarded in favor of appellants.

Stockslager, C. J., and Sullivan, J., concur.

ON PETITION FOR REHEARING.

(January 14, 1907.)

SULLIVAN, J.—This is a petition for a rehearing. Counsel for respondent first complains of the following language found in the opinion, to wit: "The plaintiffs were entitled to an opportunity to offer evidence in rebuttal thereof, or tending to show a waiver of the conditions and obligations pleaded as defenses." It is contended by counsel that this language is contrary to the record, for the reason that it affirmatively shows that the court gave the plaintiffs opportunity to produce any evidence which they had that would rebut or tend to rebut the evidence brought out by defendant's counsel on cross-examination. The cross-examination referred to was that of the plaintiffs' witnesses, and occurred before the plaintiffs had rested their case or before the defendant had put in his evidence and rested. We know of no practice that will require the plaintiff, before he has rested his case, to put in any rebuttal evidence rebutting any evidence given by his own witnesses on cross-examination, or that would require him to put in rebuttal evidence until defendant had put in his evidence and rested. The privilege of putting in rebuttal evidence before the defendant has put in its evidence is not the kind of privilege or practice that affords the plaintiff any opportunity to offer evidence in rebuttal. The plaintiff is only required to produce his evidence in chief to support the material allegations of his com-

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plaint, and is not required or expected to anticipate the defendant's defenses, and rebut every item of evidence disclosed by the cross-examination of the plaintiffs' witnesses before the defendant has introduced his evidence. The plaintiff is entitled to introduce his rebuttal after the defendant has rested his case. The proceeding in this case illustrates the necessity of such a rule. After the court had announced the novel proposition that the plaintiffs might, in making their case in chief, offer evidence in rebuttal of the facts disclosed by the cross-examination of their own witnesses, the plaintiffs then and there tendered such evidence as they had present at that time, and then concluded that they required another witness who was not in attendance upon the court at that time. They thereupon asked for a continuance in order to secure the evidence of such witness. This application was denied. The practice of requiring the plaintiff to put in his rebuttal evidence before the defendant has put in his evidence is not the correct practice. The trial court has no authority to enforce such an order or procedure. With reference to the facts established by the defendant's cross-examination of plaintiffs' witnesses, it will be observed that where a defendant moves for a nonsuit on the plaintiff's evidence, he is deemed to have admitted the existence of every fact which such evidence tends to prove, or which can be gathered from any reasonable view of the evidence. (*Later v. Haywood, ante*, p. 78, 85 Pac. 494.) In such cases the evidence must be construed most strongly against the moving party and in favor of the one who introduced the evidence.

The petitioner next contends that under the view of the law taken by the court to the effect that plaintiffs must plead and prove conditions precedent, and that the court has misapplied the law to the facts of this case, and contends that the two principal points on which they relied to defeat plaintiffs' action and to support the order of the judge in granting a nonsuit, are as follows: a. That if any of the property be encumbered at the time of the issuance of policy, such encumbrance avoided the entire policy; b. That if the title of the insured be other than "unconditional and sole own-

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ership," or if the subject of insurance be a building on ground not owned by the insured in fee simple, the entire policy should thereby be avoided. This court agrees with counsel that those conditions are properly classed among conditions precedent, and that they have been so treated by many courts. What we intended to say in the original opinion, but failed to say, is this: while these conditions were conditions precedent to be performed or made to exist prior to the consummation of the contract and the delivery of the policy, the fact of the delivery of the policy raises the *prima facie* presumption that those facts were all found by the insurer to exist before the policy was delivered. When plaintiffs proved execution and delivery of the policy and produced that policy in evidence, it at least raised the presumption that all the facts deemed necessary to exist prior to the delivery of that policy did in fact exist. While the burden of proof in many instances is on the plaintiff, there are certain presumptions of law which arise from the existence of certain other facts, and those presumptions have the weight of *prima facie* evidence, and relieve the party upon whom the burden of proof rests, in the first instance, from producing evidence to show that such facts actually existed. Such presumptions may be overcome by the opposing party producing evidence to show a contrary state of facts. For instance, if the party produced at the trial negotiable paper in a court where suit thereon has been brought, the presentation and possession of such paper is *prima facie* evidence of the ownership thereof, but such presumption may be overcome by evidence to the contrary.

In the case at bar the written application, if there was one, may have set forth the fact that the plaintiffs were not the owners in fee of the real estate on which the property insured was situated, and it may have set forth the fact that the property was mortgaged. If it did, and the respondent issued its policy under those facts, it is now estopped from claiming that said policy is void because of certain provisions contained therein. We are aware that some authorities do not agree with that view, but we believe the better reason is with the authorities that hold as we have above held.

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We gather from the evidence that all the property insured was not mortgaged, and in case that it should be held that a part of said property was mortgaged and a part not, and that the policy was valid as to the part not mortgaged and invalid as to the part mortgaged, the plaintiffs would be entitled to recover as to the part not mortgaged. Anyway, if it is shown that the mortgage existed upon said property, it would devolve upon the defendant to show that it was a valid subsisting mortgage that could be enforced in a court of equity. If the defendant pleads the invalidity of the policy on account of the mortgage, it must show the facts above indicated.

Counsel for petitioner says that this court must have labored under the apprehension that the plaintiffs had not had an opportunity to present their evidence, and they contend that the record shows they had an opportunity and remained silent under the court's request for the evidence. In regard to that contention it is sufficient to say that the plaintiffs had the right under the law to present whatever rebuttal testimony they had after the defendant had put in its evidence and rested. It is not sufficient to say that the plaintiffs put in their evidence and were then given an opportunity by the court to present their rebuttal evidence before the defense had rested or put in any evidence whatever, and that that was a sufficient opportunity for them to put in their rebuttal. The court might just as well have undertaken to require them to put in their rebuttal before any evidence had been put in whatever. We recognize that it is a maxim of common life that "Opportunity knocks but once at each man's door," but we are advised that there is a time and season for all things, and rebuttal evidence on the part of the plaintiff is not required under the law until the defense has rested.

As stated in the original opinion, if the title disclosed was held to be short of the requirements contained in the policy, still it would not defeat the right to recover under the policy if it could be shown that the insured in their application truly represented the state and condition of the title to the property. In such case the insurer could not insert a contrary

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provision in the policy with knowledge of the true condition of the title, and thereby bind the insured and defeat his right of recovery in case of loss after having received the premium. A rehearing is denied.

Ailshie, C. J., concurs.

Stewart, J., took no part in the decision.

(November 27, 1906.)

PÉTER J. FREPONS, Respondent, v. R. GROSTEIN, Appellant.

[87 Pac. 1004.]

JOINDER OF CAUSES OF ACTION—EXCESSIVE DAMAGES—PREJUDICE OR PASSION OF JURY—OBSTRUCTION OF LIGHT AND AIR—INSUFFICIENCY OF EVIDENCE—ARBITRATION—MATTERS CONSIDERED BY ARBITRATORS—INSTRUCTIONS TO JURY—SUBSTANTIAL CONFLICT IN EVIDENCE—RIGHTS OF TENANT—RIGHTS OF LANDLORD—ABANDONMENT OF PREMISES—ERRORS—SUBSTANTIAL RIGHTS.

1. Under the provisions of section 4169, Revised Statutes, a plaintiff may join in the same action all injuries to property arising out of the same contract.

2. *Held*, that the record does not show that the jury were influenced by prejudice or passion in arriving at their verdict.

3. Where the court instructs a jury, in a damage case, that the plaintiff cannot recover because of the obstruction of light or air, the presumption is that the jury observed the instruction.

4. *Held*, that the evidence is sufficient to sustain the verdict of the jury.

5. Where the plaintiff and defendant enter into an agreement to arbitrate certain differences between them, and the question is put in issue in an action whether future damages were considered by the arbitrators, it is a question of fact for the jury, and where there is substantial conflict in the evidence on that point, the verdict of the jury will not be disturbed.

6. The court properly instructed the jury to the effect that if they found that the respondent had submitted to the arbitrators

Argument for Appellant.

not only the damages which had accrued, but also the damages which might accrue in the future, it would be a complete settlement of the matter, and also instructed them to determine from the facts as shown by the evidence what matters were submitted.

7. A landlord cannot, after he has rented rooms for a certain purpose, so tear down and mutilate the building as to render such rooms unsuitable for the purpose for which they were leased, without being liable for damages, unless he first obtain permission of the lessee.

8. If a landlord make a leased premises unfit for the uses for which it was leased, he cannot recover rent for the leased premises if the lessee abandons the same.

(Syllabus by the court.)

APPEAL from the District Court of the Second Judicial District for Nez Perce County. Hon. Edgar C. Steele, Judge.

Action to recover damages. Judgment for the plaintiff. *Affirmed.*

Eugene O'Neill and Lloyd H. Eriesson, for Appellant.

The first cause—damage to furniture from tearing out of walls—being on contract based upon terms of the lease for quiet enjoyment, and the second, on a purported tort in the wrongful and unlawful construction of an adjoining building creating an alleged nuisance resulting from an alleged trespass, such causes cannot be joined. (Rev. Stats., sec. 4169; *Kruger v. St. Joe Lumber Co.*, 11 Idaho, 504, 83 Pac. 695.)

The lease is not surrendered or the term ended where, as in this case, the plaintiff retains the keys and refuses to let the landlord enter or re-lease the premises. (Taylor on Landlord and Tenant, sec. 517.)

One of the implied covenants of a lease is that the tenant shall pay rent so long as he holds the property. The plaintiff never surrendered his lease. The mere entry upon a portion of the property or disturbing of a tenant without eviction does not relieve from this covenant to pay rent. (1 Taylor on Landlord and Tenant, sec. 380.)

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While the plaintiff retained possession and control of the leased premises, he could not avoid this rent, and he could not set up as counterclaim any damages or offsets resulting from the condition of the premises, or for an invasion of any portion thereof by the defendant. Such invasion would be a trespass, and cannot be counterclaimed against an action upon contract. (*Borell v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170; *City of Lewiston v. Booth*, 3 Idaho, 692, 34 Pac. 809; Rev. Stats., secs. 4183, 4184; *Bartlett v. Farrington*, 120 Mass. 284; *Lounsbery v. Snyder*, 31 N. Y. 514.)

J. C. Applewhite, B. S. Crow and S. O. Tannahill, for Respondent.

The complaint states but one cause of action. It is for breach of covenant for quiet enjoyment. (*McDowell v. Hymen*, 117 Cal. 67, 48 Pac. 984.) But if it be conceded that several causes of action have been joined, they have been properly joined. They are all for "injuries to property." (Rev. Stats., sec. 4169.)

"Causes of action for injuries to property form a distinct class, and the generality of this language permits the union of claims arising from injuries of all kinds, whether with or without force, whether direct or consequential, and whether to real or to personal property." (Pomeroy's Code Remedies, 4th ed., sec. 389.)

Where the landlord erects a structure partly or wholly upon the leased premises, the wrongful erection of the structure is held to be an eviction. (*Boyce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322.)

If defendant in the case at bar interfered with the walls of the building which he had leased, or put a building partly upon the leased premises in such manner as to darken the windows on those premises, it amounted to an eviction. (*Wusthoff v. Schwartz*, 32 Wash. 337, 73 Pac. 407.)

There can be no question that building so close to a hotel as to darken the outside rooms will very largely destroy its value as hotel property. Therefore, having leased the property for that specific purpose, the landlord would have no

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right, during the life of the lease, to do anything which would damage the value of the leasehold. (*Lay v. Bennett*, 4 Colo. App. 252, 35 Pac. 748-750; *Bancroft v. Goodwin*, 41 Wash. 253, 83 Pac. 189.)

This lease would also include the outer walls of the building, and in fact all parts of the building necessary to the enjoyment of the rooms leased. A landlord cannot, because he has rented certain rooms in a building, so tear down and destroy and mutilate the building as to render those rooms unsuitable for the purposes for which they were leased, without being liable in damages. (*McDowell v. Hyman*, 117 Cal. 67, 48 Pac. 985; *Wusthoff v. Schwartz*, 32 Wash. 337, 73 Pac. 407; *Bancroft v. Goodwin*, 41 Wash. 253, 83 Pac. 189.)

It is further contended that plaintiff never, at any time, turned over his lease or received the consent of the defendant to abandon the premises. The undisputed proof shows that he did abandon the premises on the 20th of May, 1905. This he had a right to do. (*Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *York v. Stewart*, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125; *Lay v. Bennett*, 4 Colo. App. 252, 35 Pac. 748.)

Since defendant did not comply with the implied conditions of his lease, he was not entitled to rent.

SULLIVAN, J.—This action was brought to recover damages alleged to have been sustained by the plaintiff, who is the respondent here, to a leasehold premises known as the "Gate Way Hotel," situated in the city of Lewiston, Nez Perce county, and the hotel furniture situated therein. It appears from the record that the appellant owned the Gate Way Hotel and the premises on which it was situated and the adjoining lot; that he leased said hotel to one Baughman, and thereafter said Baughman assigned said lease to the plaintiff; that said plaintiff entered into the possession of said premises under said lease about the twelfth day of November, 1904, and remained in possession thereof until the twentieth day of May, 1905, and paid rent therefor until the last-named date. About the first day of April, 1905, the appellant commenced the

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erection of a building upon the lot adjoining said hotel property; it is alleged that the appellant in erecting said building tore down the walls and roof of portions of said hotel, and built other walls in the place of those taken down; that by this tearing down and rebuilding the hotel was rendered useless for a hotel property, and that respondent's furniture was damaged in the sum of \$100, and that he was obliged to move out of the hotel; that respondent was further damaged to the extent of \$1,100 because of the erection of said building, and prayed for judgment for \$1,200. Appellant demurred to the complaint: First, that two purported causes of action had been improperly joined—(a), the cause of action for injury to property and disturbing the quiet enjoyment under the lease, and (b), a tort by creation of a nuisance. Second, that the complaint did not state facts sufficient to constitute a cause of action, which demurrer was overruled by the court. Thereupon appellant answered and set up three defenses. The first was a denial that the respondent was damaged by reason of the erection of said building; the second that the respondent had arbitrated the matters involved in this suit, and that the arbitrators had awarded him \$75 as damages, which had been paid by the appellant and received by the respondent. In the third defense the appellant, by way of cross-complaint, alleged that he had rented the premises to respondent, that the rent for the same was \$75 per month, that the respondent owed him for two months rent, and he asked for judgment for \$150. The cause was tried to a jury and a verdict was rendered in favor of the respondent for \$200. A motion for a new trial was overruled and judgment entered in favor of the respondent for \$200 and costs of suit. This appeal is from the judgment and order denying a new trial.

A number of errors are assigned. The first we will consider is that the court erred in overruling the demurrer to the complaint.. It is contended that two causes of action are improperly joined. There is nothing in this contention, for the reason that the damages sued for arose out of the same contract

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and were for injuries to property. (Rev. Stats., sec. 4169.) It is also specified that excessive damages were given by the jury under the influence of passion and prejudice. We have examined the evidence with considerable care, and are satisfied that passion or prejudice did not influence the jury in arriving at its verdict. And it is specified that it was error to submit the question of damages to the jury because of obstructing the light and air to said leased premises. There was some evidence introduced on that question. The court, however, instructed the jury that respondent could not recover for any such alleged damages, and the presumption is that the jury obeyed the instructions. The third specification is the insufficiency of the evidence to justify the verdict or decision. While the evidence is not as clear as it might be as to the actual damage done, yet we think it sufficient to sustain the verdict for \$200.

It is contended that the arbitration pleaded in the answer was binding upon the parties, and that the arbitrators took into consideration past damages and future damages for what was to occur until the completion of the new building. One of the arbitrators testified that they were to take into consideration the condition of the furniture, "driving the roomers away, and the future condition, consideration of tearing out the rear walls. Yes, sir, and darkness of the rooms. Mr. Frepons presented all of this matter to me." That witness further testified: "I didn't take into consideration only that Mr. Frepons mentioned to me as it was a hard matter to see what would occur." The respondent himself testified that he did not state to the arbitrators that their arbitration should include anything that might occur after the date that they were to pass upon the arbitration. There seems to be a conflict in the evidence on this point. The testimony of the witness Arnold is not very positive, and the arbitrator Dill testified that the condition of the furniture was one matter presented for the arbitrators' consideration, and that "if I remember right, the removal of the wall and the damage that they sustained to that time by the inconvenience that had been

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caused, and I think the light." We are unable to determine from the agreement for arbitration what was taken into consideration by the arbitrators. It simply states that a controversy is now existing and pending between the appellant and respondent in relation "to certain damages to a lease held on the Gate Way Hotel," and the article itself does not state whether future damages are to be taken into consideration or not. And we cannot, from the verdict, ascertain from what items of damage the verdict was made up.

We think from all the testimony that the jury might reasonably infer that no future damages were included in the arbitration. The court charged the jury upon the matter of arbitration to the effect that if they found that the respondent had submitted to arbitration not only the damages which had accrued but the damages which might accrue in the future, it would be a complete settlement of this matter, and also instructed them to determine from the facts as shown by the evidence what matters were submitted for arbitration. To put it most strongly in favor of the appellant, if the testimony of the two arbitrators was to the effect that they took into consideration future damages, taking all the evidence together, there is a substantial conflict upon that point, and under the well-established rule of this court a reversal will not be granted where there is a substantial conflict in the evidence. It is well established that a landlord cannot, after he has rented rooms in a building for a certain purpose, so tear down and destroy or mutilate the building as to render such rooms unsuitable for the purposes for which they were leased without being liable for damages. (*Bancroft v. Goodwin*, 41 Wash. 253, 83 Pac. 189, and authorities there cited.)

It is also contended by appellant that the respondent never at any time turned over his lease to the landlord or received the consent of appellant to abandon the premises. Undisputed proof shows that they did abandon the premises on the twentieth day of May, 1905, and we think, under the facts of the case, they had a right to do so. (*Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 222.) A landlord cannot make a

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leased premises unfit for the uses for which it was leased and recover rent therefor if the premises be abandoned.

Certain errors are assigned in regard to the admission and rejection of testimony. Some evidence was admitted over the objection of appellant that was afterward shown to be incompetent, and the court charged the jury not to consider such evidence. We have examined all the errors specified and find no substantial error in the record. We find no error that affected the substantial rights of the appellant. The judgment must, therefore, be affirmed, and it is so ordered. Costs are awarded to the respondent.

Stockslager, C. J., and Ailshie, J., concur.

(November 27, 1906.)

JOHN IRA CRAWFORD, Appellant, v. THE BONNERS
FERRY LUMBER COMPANY, a Corporation, Re-
spondent.

[87 Pac. 998.]

PERSONAL DAMAGES—DEMURRER TO COMPLAINT—SHOULD BE ORDERED
WHEN—BURDEN OF PROOF.

1. Where a complaint alleges the injury to plaintiff in plain and concise language, and that such injury resulted from the carelessness and negligence of defendant in the construction and operation of its sawmill and appliances thereto, and that plaintiff was in no way guilty of contributory negligence, and used ordinary prudence and care in the performance of the labor assigned to him, and in the performance of which he was injured, it is not subject to demurrer.

2. When the plaintiff has sufficiently plead the carelessness and negligence in the construction and operation of defendant's sawmill and other machinery connected therewith, and that through no fault of his he was injured and damaged by defendant whilst in its employ and performing the work prescribed for him by his employer, a demurrer to such complaint should be overruled, and de-

Argument for Appellant.

defendant permitted to answer setting up its defense; the burden of proof is upon defendant to show that plaintiff was guilty of contributory negligence.

(Syllabus by the court.)

APPEAL from the District Court of the First Judicial District for Kootenai County. Hon. Ralph T. Morgan, Judge.

Plaintiff commenced this action for \$2,000 personal damages. A demurrer to the complaint was sustained and judgment entered for costs. The appeal is from the judgment. *Reversed.*

R. E. McFarland, for Appellant.

The court erred in sustaining respondent's demurrer to the amended complaint.

The amended complaint clearly shows that Crawford was engaged to work in a different capacity from that in which he was injured; that on the day of the accident, over his objection, respondent required him to suspend the labor he was engaged to perform, and perform services which were new to him, and which he did not understand, and provided him with a cart and appliances with which he had had no experience; that the cart he used was too high and the driveway which he was compelled to use was too low; all of which was well known to the respondent and unknown to appellant, and could not have been discovered by him; that said conditions were latent and not an obvious danger, and that after appellant had carefully inspected the surroundings, vehicle and appliances, they appeared to him to be safe and suitable for said work. (*Williams v. Ballard Lumber Co.*, 41 Wash. 338, 83 Pac. 323; *Weist v. Coal Creek Ry. Co.*, 42 Wash. 176, 84 Pac. 725; *Choctaw, O. & G. R. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244; *Crist v. Wichita Gas & Coal Co.*, 72 Kan. 135, 83 Pac. 199; *Bird v. Utica Min. Co.*, 2 Cal. App. 674, 84 Pac. 256; *Clark v. Wolverine Portland Cement Co.*, 138 Mich. 673, 101 N. W. 845; *Munford v. Chicago R. I. & P. Ry. Co.*, 128

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Iowa, 685, 104 N. W. 1135; *Colloway v. Agar Packing Co.*, 129 Iowa, 1, 104 N. W. 721; 4 Thompson on Negligence, 4017; *Lemser v. St. Joe R. Co.*, 70 Mo. App. 209; *Galveston Ry. Co. v. Hughs*, 22 Tex. Civ. App. 134, 54 S. W. 264; *James v. Rapid Lumber Co.*, 50 La. Ann. 717, 23 South. 469, 44 L. R. A. 33; 4 Thompson on Negligence, sec. 4021; *Galveston etc. v. Manns* (Tex. Civ. App.), 84 S. W. 254; *Drake v. San Antonio etc. Co.* (Tex.), 89 S. W. 407; *Western Union v. McMullen*, 58 N. J. L. 155, 33 Atl. 384, 32 L. R. A. 351; *De Costi v. Hargraves*, 170 Mass. 375, 49 N. E. 735; Wood on Master and Servant, sec. 349; *Hill v. Gust*, 55 Ind. 45; *Hauff v. Railway Co.*, 100 U. S. 213, 25 L. ed. 612; *Wheeling v. Wason Mfg. Co.*, 135 Mass. 294; *Condon v. Missouri etc. R. R. Co.*, 78 Mo. 567; Beach on Negligence, 361; *Merrill v. Pyke*, 94 Minn. 186, 102 N. W. 393; *Texas S. L. Ry. Co. v. Waymire* (Tex. Civ. App.), 89 S. W. 452; *De Mase v. Oregon Ry. & Nav. Co.*, 40 Wash. 108, 82 Pac. 170; *Hocking v. Windsor Spring Co.*, 125 Wis. 575, 104 N. W. 705; *Anderson v. Northern Pac. Lumber Co.*, 21 Or. 281, 28 Pac. 5; *Ford v. Fitchburg R. Co.*, 110 Mass. 240. 14 Am. Rep. 598.)

John P. Gray and E. C. Macdonald, for Respondent.

The complaint herein discloses that appellant was guilty of gross negligence, although it seeks to conceal that fact by a liberal use of the allegation that plaintiff had no knowledge of the dangers incident to his occupation. It sets up no defect in the place wherein appellant had to work, or the implements given him to work with, that was not open and apparent to him as well as to the respondent.

The law requires a servant to go about with his eyes open. He has no right to rush blindly into danger and then set up that he did not see the danger. (*Wormell v. Maine Cent. R. Co.*, 76 Me. 397, 1 Am. St. Rep. 321, 10 Atl. 49; *Choctaw O. & G. R. Co. v. Holloway*, 114 Fed. 458-460, 52 C. C. A. 260; *Regan v. Palo*, 62 N. J. L. 30, 41 Atl. 364, 365; *Whelton v. West End St. Ry. Co.*, 172 Mass. 555, 52 N. E. 1072, 1073; *Miller v. Grieme*, 53 App. Div. 276, 65 N. Y. Supp. 813; *Jennings v. Tacoma Ry. & Motor Co.*, 7 Wash. 275-278, 34 Pac.

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937, 938; *Goldthwait v. Haverhill & G. St. Ry. Co.*, 160 Mass. 554, 36 N. E. 486; *Mellot v. Louisville & N. R. Co.*, 101 Ky. 212, 40 S. W. 696; *Bullivant v. Spokane*, 14 Wash. 577, 45 Pac. 42; *Minty v. Union Pac. Ry. Co.*, 2 Idaho, 471, 21 Pac. 660.)

Plaintiff, in his complaint, attempts to make much of the fact that he was directed to assume new duties against his protest that he was unfamiliar with that kind of work. Plaintiff could have accepted or refused his new occupation at his option. But upon accepting it, he assumed all the risks incident thereto. (*Leary v. Boston & A. R. Co.*, 139 Mass. 580, 52 Am. St. Rep. 733, 2 N. E. 115.)

STOCKSLAGER, C. J.—This appeal is from Kootenai county. Plaintiff filed his amended complaint, to which defendant interposed a demurrer, which was sustained, and judgment entered for costs. The appeal is from the judgment.

The complaint alleges that defendant is a corporation organized and existing under the laws of the state of Wisconsin, and doing a sawmill business in Kootenai county, this state. That about one year prior to August 24, 1904, plaintiff entered the employ of defendant as teamster to haul and skid logs and timbers in the forests owned and used by defendant in connection with its sawmill. It is then alleged that defendant, in connection with its said sawmill, used a certain carrier operated for the purpose of conveying refuse created in said sawmill to a certain box midway of said carrier, when said refuse was by said carrier dumped into dump-carts driven under said box, and hauled away by other employees of defendant; that said carrier consisted of a loop chain and stationary woodwork, constructed so as to convey said refuse from said sawmill to said box, and was about two hundred feet long; that said box had a driveway thereunder and therethrough, with heavy ceiling and timbers over said driveway, and a trap door in said ceiling and timbers through which said refuse was dumped into dump-carts below. The dump-carts used by defendant for hauling said

refuse are described as large, heavy, two-horse, four-wheeled carts, with a heavy bed or box arranged to balance on an axle to which it was held by an iron bolt; that said bed or box was held in place by means of a hook thereto, which fastened into the tongue or forepart of the running gear of the said dump-cart; that at the rear end of said bed or box there was a heavy tail-board or end-gate fastened by means of hinges, bolts or swivels in such manner that said tail-board or end-gate could be swung or turned over upon and across said bed or box when said carts were being loaded; that the said bolts, hinges or swivels extended higher than the surface of said bed or box, and that when said tail-board was swung over and across said bed or box it was about on a line with the top parts of said bolts, hinges or swivels.

The fifth allegation of the complaint is "that on the day last aforesaid, and while plaintiff was in the performance of his said duties in hauling and skidding logs and timbers in the forests of defendant pursuant to said employment, the said defendant directed and required plaintiff to suspend said work and to haul certain laths from the south end of said sawmill to a dry yard northeast of said sawmill, a distance of about five hundred feet, with one of said dump-carts; that thereupon plaintiff objected to performing said last-mentioned services and informed defendant that he was ignorant of, and did not understand said work, or dump-carts, or the use thereof, whereupon defendant further directed and required plaintiff to perform said last-mentioned labor, and insisted that he do so, and plaintiff proceeded to haul said laths as directed by defendant as aforesaid.

"VI. That it was, then and there, and at all times, the duty of the defendant to furnish, keep and maintain a safe, sufficient and suitable place for plaintiff to work in and at, and to provide, keep and maintain sufficient, suitable and safe appliances, means, implements and vehicles with which to perform said labor, and to provide, keep and maintain sufficient, suitable and safe roads over which to haul said laths, but that, disregarding its duty in the premises, and in this re-

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spect, it knowingly, carelessly and negligently caused said carrier and box to be so constructed that they were too low to safely drive under with said dump-cart loaded with laths, and said dump-cart was too high to safely drive under said carrier and box, and the only road from said south end of said sawmill to said dry yard, over, along and upon which plaintiff had to, or could, haul said laths, led and ran under said carrier and box and was rendered dangerous and unsafe by reason of said carrier and box being too low and said dump-carts too high, and that said carrier, box, dump-cart and road, by reason of the facts above stated, were dangerous and unsafe for plaintiff to work in and about in hauling said laths, and defendant at all of the times herein mentioned knowingly, carelessly and negligently kept and maintained them in such unsafe and dangerous condition, and knew of their dangerous and unsafe condition, and knew that it was unsafe and dangerous for plaintiff to haul said laths with said dump-cart, but that plaintiff had no knowledge or information of the dangerous or unsafe condition of said carrier, box, dump-cart or road, and did not know that said work was dangerous or unsafe, or that the said tail-board was too heavy and said dump-cart too high for one man to swing over and across said dump-cart, which had to be done before said dump-cart could be loaded with laths, all of which facts were well known to defendant; and said facts were not known to plaintiff, and could not be known or determined by plaintiff from any inspection which plaintiff was permitted to make, or was able to make, before or at the time of performing his duties, in the performance of which he was injured; that said dump-cart was not a fit, suitable, or safe vehicle with which to haul laths, and was not constructed for that purpose; that it was difficult for one man to load with laths, and was too high and difficult for one man to manage, handle and control when loaded with laths, all of which facts were well known to defendant and unknown to plaintiff; that plaintiff had never used a dump-cart of that sort before said day, as defendant well knew, and could not detect or know the element of dan-

ger resulting, or that might result, from such conditions as aforesaid, which was a latent and not an obvious danger; that upon a careful inspection of said road, carrier, box and dump-cart by plaintiff, they and each of them appeared to be safe and suitable for said work.

“VII. That on the day last aforesaid, and while plaintiff was hauling said laths as directed and required by defendant as aforesaid, without any assistance, and after said tail-board had been swung over and across the hind end of said bed or box of said dump-cart, and while plaintiff was ignorant of the dangerous and unsafe condition of said carrier, box, dump-cart, and road, and while they appeared to plaintiff to be safe and suitable for said work, and he was ignorant of the dangerous character of said work, in hauling a load of laths from the south end of said sawmill over and along said road and under said carrier box to said dry yard, and while plaintiff was sitting upon the seat of said dump-cart, which was in front of and lower than the bed or box of said dump-cart, driving the team of horses hitched to said cart, and while he was exercising due care and caution, without any fault of plaintiff, the hind end of said dump-cart struck against the timbers and ceiling of said box over said driveway thereunder, and caused the forepart of said dump-cart to be suddenly and with great force and violence raised and thrown up to and against said ceiling and timbers, by reason of which plaintiff was with great force and violence caught and held between and against said dump-cart and ceiling and timbers, whereby his nose and back were broken and his breast bone crushed and mangled, and plaintiff was thereby otherwise greatly shocked, injured, bruised and wounded without any fault or negligence on his part.

“VIII. That in consequence of the injuries received by the plaintiff as aforesaid, he has become and is paralyzed in his stomach, bowels and lower limbs, and became and is permanently lamed, crippled and diseased, and has suffered, and still suffers, great mental pain and anguish and great bodily pain.

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"IX. That at the time he received the injuries complained of plaintiff was a strong, able-bodied man, and could earn and was earning forty-five dollars and his board per month, and that on account of said injuries his earning capacity has been entirely destroyed.

"X. That by reason of the injuries sustained by plaintiff as aforesaid, he has been and is damaged in the sum of two thousand dollars (\$2,000)."

The demurrer is as follows: "1. The amended complaint does not state facts sufficient to constitute a cause of action. 2. The amended complaint is ambiguous, unintelligible and uncertain."

Only two errors are assigned: "1. The court erred in sustaining respondent's demurrer to the amended complaint; 2. The court erred in rendering and entering judgment dismissing appellant's action and awarding costs to respondent."

Appellant cites a long list of authorities in support of his contention that the demurrer should have been overruled. Respondent also provides us with a number of authorities contending that they support the action of the trial court, and that there was no error in sustaining the demurrer and entering judgment for costs.

There is a wide range in the decisions of appellate courts on the relation of master and servant, and under what circumstances and conditions the master is responsible for personal injuries to the servant. It would seem that justice and equity would require the master to use all reasonable means to protect the servant from injury while in his employ; any other rule would be harsh, unjust and unreasonable. If it is true, as alleged in the complaint, that appellant had been engaged in other work for respondent for a year prior to the accident, and on the day of the accident had been required by the master to perform labor with which he was not familiar; that in the performance of such labor he was injured as alleged; that he had carefully inspected the situation, and no danger was apparent; that he took the team and dump-

cart furnished him by respondent, loaded the laths as directed, and followed the only road furnished for him and met with the accident as alleged; that no warning had been given him by respondent or anyone acting for it of the danger in passing under the carrier with the dump-cart loaded with laths, it would seem to us that appellant was not guilty of contributory negligence, and that respondent should be required to respond in damages for his injury. When appellant was furnished the team and dump-cart and directed to haul the laths to the dry-house, and there was but one road over which he could travel, he had a right to assume that the cart loaded with laths would safely pass under the carrier. especially when it was his first day in the new field of labor assigned him. We are not without authority in this conclusion. (*Weist v. Case Creek Ry. Co.*, 42 Wash. 176, 84 Pac. 725.) In *Christ v. Wichita Gas, Electric Light & Power Co.*, 72 Kan. 135, 83 Pac. 199, Mr. Justice Smith, of the Kansas supreme court, discussing a personal damage case, says: "The rule requiring a master to furnish his servant a reasonably safe place to work has no iron-bound limitations as to whether the place be a permanent or a temporary one. If the master sends a servant to work in a place of danger, however temporary, and the danger arises from acts or omissions of other servants against which the servant has no means of protecting himself, it is the duty of the master to provide such warnings or to take such other steps as may be reasonably necessary to safeguard the servant so employed." In *Clark v. Wolverine Portland Cement Co.*, a recent decision of the supreme court of Michigan, 138 Mich. 673, 101 N. W. 845, the rule is laid down thus: "Where an employee is sent into a place provided by the master, where discovery of a defect is difficult, he has the right to assume, in the absence of any circumstances creating a doubt in his mind, that his safety has been provided for." (Thompson on Negligence, sec. 4017.) (*Drake v. San Antonio & A. P. Ry. Co.*, 89 S. W. 407, a Texas case, is very interesting and instructive on the duty of the master to the servant. Section

349 of Wood on Master and Servant says: "When the servant has equal knowledge with the master of the danger incident to the work, he takes the risk upon himself if he goes on with it; but this only applies where the servant is of sufficient discretion to appreciate the dangers incident to the work. Where there are latent defects or hazards incident to an occupation, of which the master knows, or ought to know, it is his duty to warn the servant of them fully, and failing to do so, he is liable to him for any injury that he may sustain in consequence of such neglect; and this rule applies even when the danger or hazard is patent, if, through inexperience or other cause, the servant is incompetent to fully understand and appreciate the nature and extent of the hazard." Mr. Beach on Contributory Negligence, section 156, says: "Upon turning to the decisions we shall find that the decided weight of authority is in favor of the rule that the burden is upon the plaintiff in these actions to show his own freedom from contributory negligence," and cites in support of this text Massachusetts, Maine, Mississippi, Louisiana, North Carolina, Michigan, Oregon, Illinois, Connecticut, Iowa and Indiana, and further says that "This rule has not in general found favor with the text-writers and the theorists and critics; it is submitted that, if there is to be any inflexible rule, this is the one which will most often subserve the ends of substantial justice." Then at section 157 the author says: "In many jurisdictions it is the rule that contributory negligence is matter of defense, and that the burden of establishing it is upon the defendant. Where this rule obtains, the plaintiff has made his case when he has shown injury to himself, and negligence on the part of the defendant, which was a proximate cause of it. It then devolves upon the defendant to allege and prove contributory negligence as matter of defense, the presumption being in favor of the plaintiff, that he was, at the time of the accident, in the exercise of due care, and that the injury was caused wholly by the defendant's negligent misconduct. This is the doctrine of the supreme court of the United States, and

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it is the rule in Alabama, California, Georgia, Kentucky, Kansas, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, Nebraska, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Wisconsin, West Virginia, Vermont and Colorado, as well as in England."

The two sections above referred to will be found quite interesting and instructive on the subject under consideration. We can see much more reason for the rule laid down in the last section and followed by most of the American courts, as well as in the courts of England, as stated by Mr. Beach. It is only fair to assume that the master knows, or should know, the condition of his property and of any danger that may be lurking in the construction or operation of any part of it to his servants, hence his duty to repair the evil, or warn his employees of the possible danger to them.

Many other authorities are cited by appellant and a number by respondent, but a careful inspection of all of them convinces us that the demurrer in this case should have been overruled and the defendant required to plead by way of answer to the complaint.

The judgment is reversed and remanded to the lower court, with instructions to overrule the demurrer and give defendant reasonable time to answer the complaint if it so desires. Costs to appellant.

Ailshie, J., and Sullivan, J., concur.

Points Decided.

(November 28, 1906.)

JOHN RISSE, et ux., Respondents, v. O. M. COLLINS, et al.,
Appellants.

[87 Pac. 1006.]

**TRESPASS—TITLE TO LAND ON WHICH TRESPASS COMMITTED—DAMAGES
TO GROWING CROP—MEASURE OF DAMAGES—METHODS OF ASCER-
TAINING DAMAGES.**

1. An action may be maintained under section 1210 of the Revised Statutes for the trespass of sheep within two miles of plaintiff's dwelling-house, where the plaintiff is the absolute owner in fee simple of the lands upon which his dwelling-house is situated.

2. Under the provisions of section 20, article 5, of the state constitution, the district courts have concurrent original jurisdiction with justice courts in actions prosecuted under sections 1210 and 1211 of the Revised Statutes for the unlawful herding and grazing of sheep.

3. In actions prosecuted under sections 1210 and 1211 of the Revised Statutes, damages sustained by reason of the herding and grazing sheep upon the public unappropriated lands within two miles of plaintiff's dwelling-house are measured by an entirely different standard and made up of different elements, and rest on a different theory from damages sustained by reason of such livestock herding and grazing upon the plaintiff's own lands.

4. Where the action is for damages sustained by reason of the herding and grazing of sheep upon the plaintiff's lands, and for the consequent injury and damage to his growing crops, the measure of damages is the value of the crops at the time of their destruction.

5. While the measure of damages for the destruction of growing grass is its value at the time and place it was destroyed, such value must be arrived at by the jury from evidence of such facts and circumstances as will disclose the uses for which such crop would have been most profitable, the nearest period at which it would have been marketable, and whether or not any further labor, expense or service would have been necessary to bring it to the marketable condition and period.

(Syllabus by the court.)

APPEAL from the District Court of the Second Judicial District for Nez Perce County. Hon. Edgar C. Steele, Judge.

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Argument for Appellants.

Action by plaintiff for damages caused by the trespass of sheep under the provisions of sections 1210 and 1211 of the Revised Statutes. Judgment for the plaintiffs. Defendants moved for a new trial, and thereupon appealed from the judgment and the order denying their motion. *Reversed.*

Eugene O'Neill and Lloyd H. Eriesson, for Appellants.

The district court has no jurisdiction in the first instance of causes arising under sections 1210, 1211 of the Revised Statutes.

Inasmuch as the legislature designated the justice court as the one in which this new remedy was to be enforced. no other court has jurisdiction thereof. The naming of the court in such statute vests exclusive jurisdiction therein. (*Reed v. Omnibus Co.*, 33 Cal. 212; *Smith v. Omnibus R. Co.*, 36 Cal. 281; *Territory v. Mix*, 1 Ariz. 52, 25 Pac. 528; *Territory v. Ortiz*, 1 N. Mex. 5; *Andover Turnpike Co. v. Gould*, 6 Mass. 44, 4 Am. Dec. 80; *Willis v. Yale*, 1 Met. 553; *Aldridge v. Hawkins*, 6 Blackf. (Ind.) 125; *Clear Lake W. W. Co. v. Lake Co.*, 45 Cal. 90; 23 Am. & Eng. Ency. of Law, 395; *Dollar Sav. Bank v. United States*, 19 Wall. 227, 22 L. ed. 80.)

There is no evidence of any willful or tortious act on defendants' part. The damages, then, must be such as next immediately follow and are produced by the act complained of, or if not this proximate, such as in the ordinary course of things would be likely to result therefrom. (*Sutherland on Damages*, p. 40; *Field on Damages*, sec. 10.)

Where grass is overflown the plaintiff would be entitled to recover the value of the grass submerged, but not the cost of bringing his cattle to other grazing land nor price of new pasture. (*Sabine E. T. R. Co. v. Johnson*, 65 Tex. 389.)

Remote and speculative damages are not recoverable in such an action as this. The profits are not directly connected with the act complained of in this case, and the court erred in its admission of evidence as to butter made and its instruction concerning it. (*Dorwin v. Potter*, 5 Denio, 306.)

Argument for Respondents.

The element of damages in this case under the evidence and in accordance with the evidence is confined absolutely to the plaintiff's own lands, and he is entitled to no damages such as are contemplated under the provisions of section 1210 of the Revised Statutes of Idaho.

Allowing the testimony as to the loss of milk, or the loss of butter or other loss of cows, profits from butter business or other stock was error on the part of the court, and misled the jury, they having no basis of fact under any statute authorizing the allowance of damage for any such loss.

The plaintiff, if entitled to recover, should have shown the character and value of the property destroyed, and from those facts the jury could fix the amount to be allowed. (*Axtell v. Northern Pac. Ry. Co.*, 9 Idaho, 392, 74 Pac. 1075.)

Evidence of damages may be objected to on the trial on the ground that the damages are not sufficiently pleaded, or are too remote or speculative. In such cases, if the allegations of damages are not sufficiently specific, the defendant may demur to the complaint, or may move to make the allegations of the complaint more specific, or may question the sufficiency of the petition of special damages, by motion to strike out, *by objection to the evidence when offered, or by request for instructions.* (5 Ency. of Pl. & Pr. 77; *Packard v. Stack*, 32 Vt. 11.)

Johnson & Stookey, for Respondents.

Section 20, article 5 of the state constitution provides that: "The district court shall have original jurisdiction in all cases, both at law and equity." If it is held that section 1211, Revised Statutes, gives exclusive jurisdiction to justice courts, then it is clearly repugnant to the above clause of the constitution, as it deprives the district court of jurisdiction in a class of cases, and there can be no doubt of the intention of the framers of the constitution to give the district court unlimited jurisdiction in both law and equity.

The adoption of a self-executing constitutional provision which conflicts with an existing statute operates as an implied

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repeal of such statute. (26 Am. & Eng. Ency. of Law, 2d ed., 723.)

The owners of land, as well as persons having possessory claims, have a right to bring actions in this class of cases. "The legislature evidently intended to protect settlers from the injury and annoyance of having sheep herded and grazed around their habitations, whether they possessed the same absolutely and had their title thereto or held only by mere naked possession." (*Sifers v. Johnson*, 7 Idaho, 798, 97 Am. St. Rep. 271, 65 Pac. 709, 54 L. R. A. 785.)

No objection to the facts as pleaded in amended complaint in relation to special damages covering the dairy business, handling of beef cattle, the purchase of feed and the taking of certain stock to the Blue Mountains in the state of Oregon, etc., were taken in the lower court by appellants (defendants), either by demurrer or motion, and they have, therefore, waived any objection they might have had to the introduction of this class of testimony under said amended complaint. (Rev. Stats., sec. 4178; *Carter v. Wann*, 6 Idaho, 556, 57 Pac. 314; *Aulbach v. Dahler*, 4 Idaho, 654-659, 43 Pac. 322; *Palmer v. Utah Ry. Co.*, 2 Idaho, 315, 13 Pac. 425.)

AILSHIE, J.—This action was commenced in the district court in and for Nez Perce county on September 9, 1904, and thereafter, and on December 1st, the plaintiffs filed an amended complaint praying judgment in the sum of \$2,005.-50 for damages sustained by reason of the defendants' herding and grazing their sheep upon the lands of plaintiffs, and within two miles of their dwelling-house, in violation of the provisions of section 1210, Revised Statutes. Defendants answered and the case went to trial, and resulted in a verdict and judgment in favor of the plaintiffs in the sum of \$150. Defendants have appealed from the judgment and an order denying their motion for a new trial. They have assigned some seventy-two errors, but we shall not attempt to consider them singly as they are all reducible to a few leading propositions, the determination of which will dispose of all the assign-

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ments. It is first contended by appellants that since the plaintiffs were the owners of the lands and premises on which their dwelling-house was situated, that the case for that reason does not come within the purview of sections 1210 and 1211 of the Revised Statutes, and that those provisions only pretend to apply to possessory claims and dwellings situated thereon. This contention is not tenable, and has been disposed of adversely to appellants in *Sifers v. Johnson*, 7 Idaho. 798, 97 Am. St. Rep. 271, 65 Pac. 709, 54 L. R. A. 785. The statute was there held to apply as well to a settler who had absolute title as to one who had a mere naked possession.

It is next contended by appellants that their demurrer on the ground of want of jurisdiction in the district court should have been sustained. Section 1211, which provides the remedy in these cases, contains this provision: "The owner or the agent of such owner of sheep violating the provisions of the last section, on complaint of the party or parties injured before any justice of the peace for the precinct where either of the interested parties may reside is liable," etc.

Appellants insist that these statutes created a new right and provided a new remedy for its enforcement, and that in such case the remedy must be strictly pursued and is exclusive of all other remedies, and that this is also true as to the forum provided in which such remedy may be pursued. In support of this argument counsel cites the following authorities: *Reed v. Omnibus R. Co.*, 33 Cal. 212; *Smith v. Omnibus R. Co.*, 36 Cal. 281; *Territory v. Mix*, 1 Ariz. 52, 25 Pac. 528; *Territory v. Ortiz*, 1 N. Mex. 5; *Andover Turnpike Co. v. Gould*, 6 Mass. 44, 4 Am. Dec. 80; *Willis v. Yale*, 1 Met. 553; *Aldridge v. Hawkins*, 6 Blackf. 125; *Clear Lake W. W. Co. v. Lake Co.*, 45 Cal. 90; 23 Am. & Eng. Ency. of Law, 395; *Dollar Savings Bank v. United States*, 19 Wall. 227, 22 L. ed. 80. Some of these authorities directly support the appellants' contention, while others are at least indicative of that view. We are bound, however, by the provisions of the constitution which provides at section 20 of article 5 as follows: "The district court shall have original jurisdiction in all cases, both at law

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and in equity, and such appellate jurisdiction as may be conferred by law." It should be borne in mind that sections 1210 and 1211 of the Revised Statutes were enacted by the territorial legislature in 1875—fifteen years before the adoption of the constitution. During that period of time the jurisdiction of the courts was prescribed by statute, and the jurisdiction and power of the district courts was somewhat different from what it has been since the adoption of the constitution. While the contention made by appellants might have been sustained prior to the adoption of the constitution, it cannot be done now. The people in the adoption of the constitution gave the district courts concurrent "original jurisdiction in all cases both at law and in equity," and no statute can deprive them of such jurisdiction. If there be any question as to the remedy provided by this statute and the forum in which the same must be pursued, then that doubt is dispelled by the constitution impliedly writing into the statute the provisions of section 20, article 5, giving to the district courts concurrent original jurisdiction with the justice court.

Plaintiffs allege in their amended complaint general damages under the provisions of sections 1210 and 1211 of the Revised Statutes, and also allege special damages as follows: 1. That they were the owners of twenty milch cows, which were kept and pastured upon their premises at the time of the trespass alleged, and that they were engaged in manufacturing butter, and that the loss of their pasture closed to them this industry to their damage in the sum of \$600. 2. That during the times mentioned they were the owners of thirty head of beef cattle, which were kept and pastured on their premises; that owing to the acts of defendants in permitting their sheep to feed on and destroy the grass growing on the premises they were put to an additional expense of \$450 in caring for and feeding their cattle, and that by reason thereof they were also obliged to purchase feed for such stock to the amount of \$240. 3. That on account of the defendants' herding and grazing their sheep upon plaintiffs'

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premises, plaintiffs were obliged to seek pasturage for sixty-four head of cattle and ten head of horses, and that it became necessary for them to take such livestock to the Blue Mountains, in the state of Oregon, for pasturage, and that they incurred expenses in the employment of herders and rental for range and pasturage and payment of ferriage to the extent of \$215.50. The defendants denied these allegations of special damages for want of information as to such facts. Upon the trial the plaintiffs were permitted to introduce evidence tending to establish the general allegation of trespass and amount of damages sustained, and they were also permitted, over the objection of defendants, to introduce evidence in support of each of the allegations as to special damages. They produced evidence to show that their pasture was eaten off and destroyed by defendants' sheep; that they had previously been accustomed to graze their cows on this pasture, and that they made butter from the milk, and produced an invoice of the amount of butter they had been making during the three previous years, and they testified that they had been obliged to abandon the butter business after these repeated trespasses; they also proved the amount of feed they were obliged to buy for their livestock and the amount of expense they had incurred in taking a part of their stock over into Oregon and hiring pasture for them, and the amount they had lost on thirty head of beef cattle by reason of their not being fat enough for the market in the early spring, and other evidence along these lines tending to establish their allegations of special damages. Defendants objected to all this class of evidence, and insisted that the measure of damages in such case was the value of the grass or growing crops at the time of their destruction. The court overruled the defendant's objections, and after the evidence was closed the court instructed the jury that these were proper items of damage, and that they should allow the plaintiffs whatever sum they believed they had suffered in these respects. Respondents have argued upon this appeal that the defendants in the lower court waived their objection to the allegations of special damages, for the reason

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that they failed to demur. A failure to demur to these paragraphs of the complaint was not a waiver of the defendants' right to object to the introduction of evidence in support thereof, for the reason that these allegations were made a part of one cause of action and the plaintiffs had stated a good cause of action for general damages. It is true that these allegations might have been reached by a motion to strike them from the complaint, but a failure to make such motion was not a waiver of the right to object to the introduction of evidence in support of the allegations. Before passing to a consideration of the rule as to the measure of damages, it is well enough to observe: That in this case there was no evidence produced showing, or tending to show, that the defendants' sheep herded or grazed upon any public or unappropriated lands within two miles of the dwelling-house of the plaintiffs, and the plaintiffs do not appear to have attempted to establish any damages or any cause for damages on that account. On the other hand, it is abundantly established that the defendants' sheep did enter upon the lands of plaintiffs and within their inclosure, and consume and destroy a large amount of grass and alfalfa. The cause of damage for which a plaintiff may recover in these cases is widely different where the trespass is upon the plaintiff's lands from that where the trespass has been committed, not upon his lands, but upon public unappropriated lands within two miles of his dwelling-house. Since there was no evidence in this case either establishing or tending to establish a trespass upon public unappropriated lands within the two mile limit, it is unnecessary for us to consider or pass upon the elements of damage or measure thereof in such case or the modes of proof to be adopted. The only question which demands our consideration is the measure of damage and character of proof admissible to establish such damage where the trespass has been committed upon the plaintiff's own lands. The class and character of evidence admitted in this case at once suggests its uncertainty, remoteness and speculative nature, and that it could not have been reasonably foreseen by the parties committing the trespass.

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In the first place, the owner of lands would have been entitled to damages for the destruction of his growing crop of grass even though he had no livestock whatever. On the other hand, he was not entitled to recover from the defendants the expense incurred in driving a band of cattle fifty or one hundred miles and there herding them, nor would he be entitled to speculate on the amount of butter he could make or the amount of profit he might have realized out of beef cattle he could have sold had his grass not been destroyed. A large element entering into the successful method of butter-making is the knowledge of how to make it and the labor and skill employed in doing the work. On the other hand, the plaintiffs were not obliged to go out of the butter business because the grass was destroyed. They might have purchased feed for their cows and continued in the business. This observation simply illustrates the uncertainty and remoteness of such an element of damages. Without entering into any discussion or review of the conflicting rules as to the measure of damages to growing crops, we are satisfied, after an examination of the question, to say that the measure of damages in such cases is, and should be, the value of the crop at the time of the injury or destruction. (4 Sutherland on Damages, sec. 1023; 13 Cyc. 153; 8 Am. & Eng. Ency. of Law, 2d ed., 330; *Colorado Con. Land & Water Co. v. Hartman*, 5 Colo. App. 150, 38 Pac. 62; *Buttles v. Chicago, S. F. & C. Ry. Co.*, 43 Mo. App. 280; *Gulf, C. & E. F. R. Co. v. Matthews*, 3 Tex. Civ. App. 493, 23 S. W. 90; *Sabine & Eastern Texas Ry. Co. v. Johnson*, 65 Tex. 389; *Gulf, C. & S. F. R. Co. v. Carter* (Tex. Civ. App.), 25 S. W. 1023.) In a case like the one under consideration a further element of damage might, and most likely would, arise, and that is where the pasture is not only grazed off by sheep, but where a large band has run over the ground and tramped and cut out most of the grass and grass roots so as to amount to a permanent injury to the pasture for the remainder of the season, and this would be especially true where lands were chiefly useful for grazing and pasturage purposes. The chief difficulty will arise in every

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such case in determining the method of proving the value of growing grass or growing crops at a fixed and specified time, and of course whatever the proof may be and whatever mode may be adopted, the true value will still remain to some extent indefinite and uncertain. This, however, is true in most all cases of tort. But a jury selected from the county or community where the loss was suffered, after hearing the evidence as to the nature and condition of the crops and the extent of the injury, will seldom go far wrong in their estimate of the real injury done. It is true that very few growing crops aside from pasture have a market value at any specified or fixed time prior to maturing. Now, in the case at bar, in establishing the damage done, it would have been proper to inquire into the ease or difficulty in securing other pasture near by, and the market price of similar pasture or the price of such feed stuffs as would have been necessary to keep and feed plaintiffs' livestock, or to have shown the price the plaintiffs could have secured for their pasture or the number of livestock they could have pastured thereon, and the value per month for the pasturage of each head of such livestock, and such other evidence of kindred and similar import which would have enabled the jury to intelligently fix the value of the property destroyed at the time of its destruction.

Any evidence tending to show what the grass was worth when put to any of the uses for which it was valuable should be admitted. Growing grass that is to be used for grazing purposes differs from other growing crops, in that there is no further expense necessary for cultivation and harvesting in order for the owner to enjoy the full benefits of the crop. In such case the crop is marketable and has a market value whenever it is fit for grazing purposes. In cases of injury to or destruction of growing crops the date from which to ascertain and arrive at the true value thereof must be made up of numerous facts, such as the value at the nearest period at which the crop would be marketable, and the labor and expense necessary to bring the crop to the marketable period and preparing it therefor.

Points Decided.

This is a case in which we very much dislike to grant a new trial, for the reason that it clearly appears to our satisfaction from this record that there was sufficient competent evidence submitted to the jury as to the actual damages sustained by plaintiffs to justify them in rendering a verdict for the amount returned in this case. But there was so much evidence admitted that was wholly incompetent and inadmissible tending to establish the several allegations of special damages that we cannot say that the jury was not influenced thereby. This is especially true in the face of the instructions given by the court wherein he told the jury that this evidence was competent for their consideration, and should be weighed by them in arriving at their verdict. On account of the admission of this line of evidence and the giving of these instructions, the judgment must be reversed and the cause remanded for a new trial in accordance with the views herein expressed, and it is so ordered. Costs awarded in favor of the appellants.

Stockslager, C. J., and Sullivan, J., concur.

(November 30, 1906.)

GEORGE M. REED, Appellant, v. C. B. STEWART, Administrator, Respondent.

[87 Pac. 1002.]

MOTION TO DISMISS APPEAL—PROBATE COURTS—PROBATE LAW—PROCEEDINGS TO SELL REAL ESTATE—SALE OF REAL ESTATE—MINOR HEIRS—GUARDIAN AD LITEM—SERVICE OF NOTICE OF APPEAL—ADVERSE PARTY.

1. Under the provisions of section 5701, Revised Statutes, the property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and the possession of the administrator appointed by that court for the purposes of administration.

2. As the title to the property of the intestate in such cases passes to the heirs subject to the provisions of said section, they

Argument for Appellant.

are interested parties in the sale thereof, and where a sale has been confirmed by the probate court and the purchaser appeals from such confirmation, such heirs or their guardian *ad litem* are adverse parties and must be served with a notice of appeal.

3. Where the guardian *ad litem* of minor heirs has appeared in a proceeding commenced by the administrator to sell real estate belonging to his intestate, and consented to the sale, and the purchaser files his objections to the confirmation of such sale, and the same are overruled by the court and the sale confirmed, and the purchaser appeals from such order of confirmation, the guardian *ad litem* is an adverse party thereto, and must be served with the notice of appeal.

4. Where an administrator files his petition and commences proceedings for the sale of real estate belonging to his intestate, all of the orders made in such matter are in the one proceeding, as such proceeding consists of all orders and things done by the court in such matter from the filing of the petition to the confirmation of the sale and delivery of the deed.

5. The heirs in such cases are pecuniarily interested in all such property and are entitled to their day in court in all of the proceedings affecting the title to such property, and are adverse parties under the provisions of section 4808, Revised Statutes.

(Syllabus by the court.)

APPEAL from the District Court of the Second Judicial District for Idaho County. Hon. Edgar C. Steele, Judge.

This is an appeal from the judgment of the district court dismissing the appeal of appellant from an order made by the probate court of Idaho county directing the confirmation of the sale of certain real estate and the conveyance thereof. A motion to dismiss the appeal from the judgment of the trial court is granted and the *judgment affirmed*.

Scales & Taylor, for Appellant.

Session Laws of 1903, pages 372, 373, expressly changes the old law, and definitely provides who shall be served with notice of appeal. The notice of appeal must be filed with the clerk of the probate court and a similar notice must be served "upon the administrator, administratrix, executor and execu-

Argument for Respondent.

trix (unless they be the appellants), and upon all other parties interested who appeared upon the motion or proceeding which the appellant desires to have reviewed, or upon their attorneys."

On the proceeding appealed from the only persons who appeared was the administrator, by his attorney, J. M. McDonald, and appellant with his attorneys, Scales & Taylor.

"Beneficiaries under a will, who have not appeared and resisted the petition in probate proceedings of one claiming as heir, when notice has been given to all persons interested in the estate, are not necessary parties to the appeal from an order denying a new trial." (*In re Ryer's Estate*, 110 Cal. 556, 42 Pac. 1082; *In re Calkin's Estate*, 112 Cal. 296, 44 Pac. 577.)

The notice seems to have been served on all the respondents who appeared in the proceeding, and that was all the statute required. (*Seattle & M. Ry. Co. v. Johnson*, 7 Wash. 97, 34 Pac. 567.)

No service was made on the guardian *ad litem*; held none required, he having made no appearance. (*Home Savings & Loan Assn. v. Burton*, 20 Wash. 688, 56 Pac. 940; *Ryan v. Ferguson*, 3 Wash. 356, 28 Pac. 910; *Herriman v. Menzies*, 115 Cal. 16, 56 Am. St. Rep. 82, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318.)

Many of the probate proceedings are separate and distinct; require notice to all parties interested, at the different stages, and each is a distinct order from which an appeal may be had, and a reversal of the order not appealed from. (Idaho Rev. Stats., sec. 4831.)

J. M. McDonald, for Respondent.

Notice of appeal must be served upon the adverse party, and by adverse party is meant all parties whose rights may be affected by the reversal or modification of the judgment appealed from. (*Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103; *Lydon v. Godard*, 5 Idaho, 607, 51 Pac. 459; *Coffin v. Edgington*, 2 Idaho, 627, 23 Pac. 80, 7 L. R. A. 646; *Lewiston Nat.*

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Bank v. Tefft, 6 Idaho, 104, 53 Pac. 271; *Inglehart v. Stansbury*, 151 U. S. 68, 38 L. ed. 76, 14 Sup. Ct. Rep. 237; *Adams v. McPherson*, 3 Idaho, 718, 34 Pac. 1095.)

Any reversal or modification of the order confirming the sale of the said real estate would affect the interests of the said minors, and it is necessary that they or their guardian *ad litem* be served with notice of appeal. (*Senter v. DeBernal*, 38 Cal. 637.)

The supreme court cannot entertain the appeal, as the same has not been perfected. (*Adams v. McPherson*, 3 Idaho, 718, 34 Pac. 1095, and cases cited.)

The appellant contends that the court will only review the proceedings had at the confirmation of sale, and served notice upon those that appeared at such proceedings, as is required by Session Laws of 1903, regulating appeals to the district court from the probate court.

This narrow construction cannot be accepted, for the same is not the construction placed upon the word "proceeding" by the courts. (*Moorewood v. Hollister*, 6 N. Y. 321.)

All the acts and proceedings of the probate court in divesting the heirs of the real estate of an estate is one action, and the law will not sanction the heirs being deprived of their interests in said property without their day in court. (Rev. Stats. 1887, sec. 5523; *Bloom v. Burdick*, 1 Hill. 130; *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Schneider v. McFarland*, 2 N. Y. 459.)

SULLIVAN, J.—This is an appeal from the judgment of a district court dismissing the appeal from an order made by the probate court of Idaho county directing the confirmation of the sale of real estate and the conveyance thereof. The facts of the case are substantially as follows: The administrator of the estate of Louis H. Denison, deceased, filed his petition for the sale of certain real estate of his intestate's estate in the probate court of said county, for the purpose of paying the debts of said deceased, and alleged in said petition that he was also the guardian of the minor heirs of said

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deceased, and prayed that a guardian *ad litem* be appointed for said minor heirs to represent their interests in said matter; said petition also showed that said estate is solvent, and that there will be a residue for distribution among the heirs after all debts and expenses of administering said estate are paid. It appears that the probate court duly appointed R. F. Fulton, Esq., as guardian *ad litem* of said minor heirs to represent them in the matter of said sale; that upon the hearing of said petition said Fulton appeared as such guardian *ad litem*, and consented that said real estate be sold, and thereupon the probate court duly authorized said administrator to sell the same at private sale; that thereafter on July 11, 1905, the said administrator received a bid for said real estate from the appellant, the same being accompanied with ten per cent of the bid in cash, which bid the said administrator accepted, and thereafter on July 31, 1905, he filed his return of said sale in the probate court of said county, and by order of said court said return of sale was set down for hearing on the twenty-sixth day of August, 1905. No objection was made by said Fulton as guardian *ad litem* to the confirmation of said sale. But on August 26, 1905, the said appellant appeared in said probate court and filed his objections to the confirmation of said sale, which were overruled by the court, and the court thereupon examined said return of sale and the testimony of witnesses in support thereof, and finding that the law and all the orders of the court had been duly complied with by said administrator in said matter, and that said sale and all things connected therewith had been fairly and legally conducted and done, the same was confirmed. From said order of confirmation the appellant appealed to the district court of Idaho county, but did not serve the said guardian *ad litem* with any notice of appeal. When the matter came on for hearing in the district court the administrator moved to dismiss the appeal on the grounds following, to wit: (1) That said guardian *ad litem* had appeared on the hearing of the petition for the sale of said real estate and consented thereto, and that he was not served with said notice of appeal from the probate court to the district court; (2) That the pre-

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tended appeal was never perfected and the district court did not acquire jurisdiction over the subject matter of the parties; that said guardian *ad litem* was at all times a party to the proceedings upon whom all notices should have been served involving any interests of the minor heirs in said real estate; and (3) that the appellant was not such a party in interest as would give him a right to appeal from said order of confirmation. The record also shows that during the hearing of said motion in the district court the administrator made an offer to the appellant which would cure all the objections made by the appellant to the confirmation of said sale. After hearing the arguments of the counsel upon said motion to dismiss, the court sustained the motion and entered a judgment of dismissal, from which judgment this appeal is taken. Counsel for respondent has filed a motion in this court to dismiss this appeal on the ground that the guardian *ad litem* of said minor heirs who appeared upon the hearing of the original petition for the sale of the said real estate had not been served with a notice of appeal from the district court to this court as required by law. That motion was based upon an affidavit of the guardian *ad litem* and upon the transcript on appeal.

The only question submitted for decision on this motion is whether in a proceeding for the sale of real estate belonging to a decedent's estate the guardian *ad litem* of the minor heirs is entitled to a service of the notice of appeal from an order confirming the sale of such real estate, as an adverse party.

The law of succession to the estates of certain intestates is fixed by the provisions of section 5701, Revised Statutes, which is as follows: "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court for the purposes of administration."

From the provisions of that section it will be observed that the title to both real and personal property of one who dies without disposing of it by will passes to the heirs of the in-

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testate, subject, however, to the control of the probate court and to the possession of any administrator appointed by that court for the purposes of administration. That being true, the question arises, Would the minor heirs in the case at bar be affected by a modification or reversal of the order or judgment appealed from? If they would they are adverse parties under the provisions of section 4808, Revised Statutes, as held by this court in *Aulbach v. Dahler*, 4 Idaho, 654, 43 Pac. 322. And in *Titiman v. Alamance Min. Co.*, 9 Idaho, 240, 74 Pac. 529, this court passed upon the question under consideration, and there cited numerous decisions from California and this court bearing upon this question.

It is shown by the record that the personal property belonging to said estate was of the value of \$1,146.70, and the real estate belonging thereto (it being the real estate involved in the sale in question) was of the value of about \$3,500, making a total of \$4,646.70, and the liabilities were about \$2,357.85. Deducting the liabilities from the assets would leave the heirs of the estate about \$2,088.85. After applying the personal property in paying the liabilities there would remain liabilities to the amount of \$1,211.15, to be paid out of the real estate. It will be observed from this that the heirs were interested in the real estate to the extent of more than \$2,000. Their guardian *ad litem* had appeared in the proceeding to sell said real estate and consented to the sale, and after the sale was made and a return of such sale made to the probate court for confirmation, the guardian *ad litem* being satisfied with the sale, of course, raised no objection to it. But the appellant who had purchased said real estate at the sale did raise certain objections to the proceeding for the sale and objected to the confirmation thereof. The court, however, overruled his objections and confirmed the sale. The appellant was thus endeavoring to defeat the sale which was satisfactory to the heirs and their guardian *ad litem*. It is very apparent that they would be affected by a modification or a reversal of the order confirming the sale. That being true, they were adverse parties to said proceeding to set aside

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the sale, and their guardian *ad litem* should have been served with the notice of appeal.

It is contended by counsel for appellant that as the guardian *ad litem* did not appear at the hearing for the confirmation of said sale, he is not entitled to service of a notice of appeal, as that was a separate proceeding and a separate order from that consenting to the sale. We are unable to concur in this contention, for when an application is made by an administrator to sell real estate of an intestate, the hearing of the application to sell and the hearing on the confirmation of the sale, if one follows, are all parts of one and the same proceeding—that is, the proceeding to sell real estate—and after the guardian *ad litem* appeared and consented to the sale, he had then appeared in the proceeding to sell and was entitled to be served with notice of appeal from any and all orders made in said matter. We cannot segregate the several things that must be done by a probate court in ordering and confirming a sale and hold each part thereof a separate proceeding. The proceeding is begun by filing the petition of the administrator and is ended by the confirmation of the sale and delivery of the deed to the purchaser. It is a theory of our law that every person interested shall have his day in court, and for that purpose must be served with proper notice and given an opportunity to appear if he cares to do so. As all of the property of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of an administrator, those heirs are pecuniarily interested in all of said property, and especially is that true if all the property is of sufficient value to pay all the debts of the intestate and leave a surplus for the heirs. The motion to dismiss must be sustained, and it is so ordered, without prejudice to another appeal. Costs are awarded to the respondent.

Stockslager, C. J., and Ailshie, J., concur.

Opinion of the Court—Ailshie, C. J., on Rehearing.

(January 16, 1907.)

ON PETITION FOR REHEARING.

[87 Pac. 1152.]

AILSHIE, C. J.—A petition for rehearing has been filed in this case, and while it does not present any new question we have thought it best to refer to some of the points dwelt upon therein. Counsel for petitioner argues that the decision of this court renders ineffective the provisions of section 1 of the act of March 11, 1903 (Sess. Laws 1903, p. 372). By the provisions of that section the appellant is only required to serve such adverse parties as “appeared upon the motion or proceeding which the appellant desires to have reviewed or upon their attorneys.” We have not intended to go beyond the provisions of that statute and have not done so. In the case at bar the minors appeared through their guardian *ad litem* at the time the order of sale was made, and we hold that each step taken from the time the order of sale was made until its confirmation constituted only a part of the one “proceeding.” It is true that under section 4831, Revised Statutes, an interested party dissatisfied with the order or decision of the court may appeal either from an order directing a sale or from an order directing a conveyance of the property. An appeal, however, from the order directing a conveyance would not authorize a review of the action of the court in directing a sale, since the statute has specifically authorized an appeal from each order and has fixed a time within which each appeal must be taken. That all the various steps necessary and required to be taken in order to make a sale and give title to real estate by direction of the probate court are each a part of one “proceeding” within the meaning of section 1 of the act of March 11th (Sess. Laws 1903, p. 372), we have no doubt whatever. All of the various steps in such proceeding look to only one end; namely, the pass-

Points Decided.

ing and transfer of title and receipt of the consideration therefor. A party interested might object, in the first place, to an order being made directing sale, but he might on the other hand be desirous of having such order made but object to a confirmation of a sale on the ground that an inadequate price had been offered. On the other hand, a bidder for the property, as in the case at bar, who had no interest in the matter at the time the order of sale was made, and who could not have appealed from such order, might desire to appeal from the order either confirming or refusing to confirm the sale, as is true in this case. Now, we have not held that heirs must be served with notice of appeal who had in fact never appeared in the proceeding wherein the sale had been ordered and the conveyance directed, but we do hold that where an heir appeared at any time in that proceeding he is entitled to service of notice of appeal. In such case he becomes an adverse party within the meaning of the statute. The petition for rehearing is denied.

Sullivan, J., concurs.

Stewart, J., took no part in the decision.

(December 3, 1906.)

JOHN SHRECK, Appellant, v. VILLAGE OF COEUR
D'ALENE, Respondent.

[87 Pac. 1001.]

NUISANCE MAINTAINED BY MUNICIPALITY—INJUNCTION PENDENTE LITE.

1. Where the plaintiff shows by his complaint and affidavits that the defendant municipality is maintaining a nuisance specially injurious to the complainant, and the defendant does not deny the existence of the nuisance, but alleges that it has taken steps to abate the same and that it means and intends to prevent any repetition or recurrence of the matters charged as constituting the nuisance.

Argument for Respondent:

sance, and affidavits are produced showing that conditions have not been materially changed and that the cause of complaint still exists, a temporary injunction ought to issue, and it is error to refuse such relief.

2. Showing made in this cause examined and held sufficient to entitle plaintiff to an injunction pendente lite.

(Syllabus by the court.)

APPEAL from the District Court of First Judicial District for Kootenai County. Hon. Ralph T. Morgan, Judge.

Plaintiff applied to the district judge on complaint and affidavits for a temporary injunction. Motion denied and plaintiff appealed. *Reversed.*

Edward La Veine, for Appellant.

The intention of the respondent village to keep the dump in question in a perfectly sanitary condition does not excuse the respondent village for its acts in the past, nor does it act as a defense to said acts. (5 Pomeroy's Equity Jurisprudence, sec. 539.)

The record and appellant's showing is sufficient to entitle him to a permanent injunction against the village of Coeur d'Alene in accordance with the prayer of his complaint. (5 Pomeroy's Equity Jurisprudence, sec. 521; *Board of Health of City of Yonkers v. Copcutt*, 140 N. Y. 12, 35 N. E. 443, 23 L. R. A. 485; *City of New Albany v. Slider*, 21 Ind. App. 392, 52 N. E. 626; *Village of Sand Point v. Doyle*, 11 Idaho, 642, 83 Pac. 598, 4 L. R. A., N. S., 810.)

Earl Saunders, for Respondent.

Where the defendant disclaims the intention of continuing a nuisance, and is using due diligence for its removal, the injunction will be refused. (High on Injunctions, 4th ed., sec. 752; *King v. Morris*, 18 N. J. Eq. (3 C. E. Green) 379.)

An injunction will not be granted to restrain an act already done. (*Wilson v. Boise City*, 7 Idaho, 69, 60 Pac. 84; *Delger v. Johnson*, 44 Cal. 182.)

Argument for Respondent.

Past injuries afford no ground for relief by injunction when there is no danger of future injuries. (1 High on Injunctions, 4th ed., sec. 798; *Esson v. Wattier*, 25 Or. 7, 34 Pac. 756.)

The granting or refusing of an injunction is within the discretion of the trial court. (*Washington etc. Ry. Co. v. Coeur d'Alene etc. Co.*, 2 Idaho, 439, 17 Pac. 142, 4 L. R. A. 409; *Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67; *Price v. Grice*, 10 Idaho, 443, 79 Pac. 387.)

Under sections 2223, 3237, 3238 and 3243, Code of Civil Procedure, it was competent and proper for the court to render judgment in accordance with the evidence in the case, as made and tried by the parties, and to treat the pleadings as amended for that purpose. It is the rule that where evidence is introduced without objection, the pleading will be considered amended to correspond with the facts proven, and the judgment will be based upon the evidence. (*Heater v. Penrod* (Neb.), 89 N. W. 762; *Enix v. Iowa Cent. R. Co.*, 114 Iowa, 508, 87 N. W. 417; *St. Louis etc. R. Co. v. Keller*, 10 Kan. App. 840, 62 Pac. 905; *Savings Bank v. Barrett*, 126 Cal. 413, 58 Pac. 914; *Sengfelder v. Insurance Co.*, 5 Wash. 121, 31 Pac. 428.)

Any variance between pleading and proof must be taken advantage of at the trial, and cannot be considered on appeal. (*Pryor v. Worford* (Ky.), 54 S. W. 838; *Jacobs v. Marks*, 183 Ill. 533, 56 N. E. 154; *Choquette v. Southerland R. Co.*, 152 Mo. 257, 53 S. W. 897.)

No variance between the pleadings and proof is material unless the adverse party has been actually misled to his prejudice, in maintaining his action or defense upon the merits. (*Wilcox Lumber Co. v. Ritteman*, 88 Minn. 18, 92 N. W. 472; *People's Nat. Bank v. Miles*, 65 Kan. 122, 69 Pac. 164; *Dudley v. Duval*, 29 Wash. 528, 70 Pac. 68; *Chicago Co. v. Stewart Lumber Co.*, 66 Neb. 835, 92 N. W. 1009.)

An amendment of pleadings will be implied where evidence is introduced without objection, and the case tried as if the proof as made was covered by the pleadings. (1 Ency. of Pl. & Pr. 641.)

Appellant was not in any way injured by the introduction of the evidence in this case on account of the state of the pleadings, and the rule is that the party to avail of any such supposed injury must present the matter at the trial, and show that he would be injured by the introduction of proof, and if he does not do so, then he never can. (*Hewitt v. Maize*, 5 Idaho, 633, 51 Pac. 607; *Hawkins v. Pocatello Water Co.*, 3 Idaho, 776, 35 Pac. 711; *Aulbach v. Dahler*, 4 Idaho, 654, 43 Pac. 322; *Bell v. Knowles*, 45 Cal. 193.)

AILSHIE, J.—This is an appeal from an order denying a temporary injunction. The plaintiff filed his complaint on the ninth day of April, 1906, charging that the defendant, the village of Coeur d'Alene was the owner of a tract of land within the vicinity of plaintiff's premises, on which it was maintaining a dump for the deposit of all kinds of waste, refuse and decaying matter, and more especially decaying animal and vegetable matter which emitted offensive and disagreeable odors and effluvia, which endanger the health and comfort of plaintiff and his family, and that the same depreciated the value of his property and rendered his premises unsafe for habitation. The substance of the complaint amounted to charging the municipality with maintaining both a public and private nuisance, which is especially injurious to the plaintiff. The plaintiff filed affidavits in support of the allegations of the complaint, and thereupon obtained from the district judge an order requiring the defendant to show cause at a time and place specified why a temporary injunction should not be granted against the defendant's maintaining the dump and continuing to cause and permit waste, decaying and refuse matter to be deposited thereon. On the return day the defendants demurred to the complaint and filed the affidavits of the village trustees, in which they deposed in effect that they had never intended to permit any vegetable or animal matter to be deposited on the dump grounds, but it was their intention at all times to only allow tin cans, ashes and such other waste and refuse to be deposited at this dump yard as would not emit or give off any offensive

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odors. It was also shown by these affidavits that they had not been informed that the dump grounds were being used for purposes other than that originally intended by them until a very short time prior to the commencement of this action; that immediately upon learning of the condition the board of trustees passed a resolution prohibiting the dumping of any animal or vegetable matter on these grounds, and instructing their officers to enforce the provisions of the resolution. That they also caused the marshal to post notices on the grounds, informing the public that all persons were prohibited from dumping any waste matter there that would give off offensive odors. The trustees also disclaim any purpose or intent on the part of themselves or the municipality represented by them to maintain any nuisance upon their premises, and also assert their purpose to prevent any nuisance thereon in the future. The plaintiff filed a counter-affidavit signed by three of the citizens who lived and resided near him and in the neighborhood of the dump grounds, in which they stated they had visited the premises in dispute and that the nuisance was still being maintained, and that decaying and decomposed matter was being deposited there still. The district judge, after hearing the matter, took it under advisement, and thereafter made and filed his order denying the injunction. Plaintiff has appealed from the order.

We think the showing made by the respective parties in this case clearly entitled the plaintiff to a temporary injunction until such time as the case could be heard in full on both sides. The defendant municipality has practically admitted at all times that this dump yard in the condition in which it was kept amounted to a nuisance, but they seem to have attempted to justify the action of the municipal officers on the grounds that they were not apprised of the condition until a short time prior to the commencement of the action, and that they immediately took the necessary steps to remove the nuisance by burying all the animal and vegetable matter found thereon, and that they faithfully and honestly attempted to prevent the dumping of any more offensive matter thereon. The officers are undoubtedly acting in good faith, and have no in-

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tent of injuring the plaintiff, but intent to injure or do a wrongful act is not the test in cases of nuisance. A party may be maintaining a nuisance or committing a lasting and permanent injury upon the rights of another without any malicious or wrongful intent toward the person injured, and yet be subject to an action to restrain him from the further commission of such acts. Of course, if it could be clearly and satisfactorily shown that the defendants had removed the cause of the nuisance, and that the plaintiff was in no further danger of its repetition or recurrence, there would be no occasion for an injunction, but that fact does not clearly appear in this case, and the plaintiff was entitled to a restraining order as prayed for. If the municipality is acting in good faith, as we have no doubt it is, an injunction against the continuation of this nuisance can work no injury upon it. In a case like this, where the plaintiff has shown a condition which the defendant admits constituted a nuisance, the discretion of the court should be liberally exercised in favor of the plaintiff, and an injunction granted *pendente lite* until the case can be fairly tried and fully determined upon all the facts presented, or until such time as the defendant can fully and clearly satisfy the court that it has removed the cause and relieved the plaintiff from further risk of its repetition.

The order of the district court denying a temporary injunction is reversed. The cause is remanded, with instructions to grant a temporary injunction *pendente lite*. Costs awarded in favor of appellant.

Stockslager, C. J., and Sullivan, J., concur.

Points Decided.

(December 5, 1906.)

**PETER LINDSTROM, Respondent, v. HOPE LUMBER
COMPANY, Appellant.**

[88 Pac. 92.]

**PLEADING—STIPULATION—REPORT OF REFEREE—TIME FOR OBJECTION
TO REPORT—ASSESSMENT OF DAMAGES BY THE JURY.**

1. Where the issues joined by the pleadings cover a claim for injury and damages suffered under a given and specific contract, and when the parties come to making their proofs before a referee, they stipulate and agree that "a full and complete accounting of all the matters and things between plaintiff and defendant shall be had and taken" under another and separate contract and transaction, "the same as if it were a part of the complaint," the losing party cannot be heard on appeal to complain of the evidence and findings touching such new issue as being outside of the issues made by the pleadings.

2. Where the respective parties have stipulated and agreed to the appointment of a referee to take testimony and report the same to the court, and they make no demand for a jury, they will be deemed by such act to have waived a jury, even if the case were one in which they would otherwise be entitled to a jury trial.

3. Where the record fails to show when the report of a referee was submitted to the court, but does show that the last testimony was taken by him over eighteen months prior to the date of filing the report, and that the attorneys for both sides were present at all the hearings before the referee, and the court makes and files his findings and judgment on the same date on which the report is filed, the losing party will not be heard on appeal to complain that he had no time or opportunity to move against the report or any part thereof, or to move to purge the evidence submitted by the report. In such case the losing party is not free from negligence and laches.

4. Where by consent of both parties evidence is taken touching differences not covered by the issues, and no objection is made thereto prior to findings and judgment, the pleadings will be treated on appeal as if they had been so amended as to make the issues covered by the proofs.

(Syllabus by the court.)

APPEAL from the District Court of First Judicial District for Kootenai County. Hon. Ralph T. Morgan, Judge.

Argument for Respondent.

Action by plaintiff for an injunction and damages. Judgment for plaintiff. Defendant moved for a new trial and the motion was denied. Appeal from the judgment and order. *Affirmed.*

Edwin McBee, for Appellant.

This is an action in equity to restrain interference by the defendant with plaintiff's contract. The object of the reference, therefore, must have been to enable a report to be made to the court as to the advisability of granting the injunction, and the question of damages would be another consideration and one which would require the introduction of a jury. The rule governing such actions in this state is laid down in the case of *Stocker v. Kirtley*, 6 Idaho, 795, 59 Pac. 891, as follows: "The complaint states but one cause of action, and the claim for damages is incidental to that. The court should have tried the equitable part of this action, and thereafter, if a jury was demanded to try the issue of damages, submitted that question to a jury." In this case no opportunity was given to demand a jury trial, but immediately on the filing of the report of the referee, findings and judgment were entered for the plaintiff in a sum of \$1,500 in excess of the amount sued for.

The order of reference was not in accordance with any statutory proceedings; it was not entered upon the agreement of the parties in writing, filed with the clerk, or entered in the minutes as provided in section 4414, Revised Statutes; nor was it by order of the court as provided by section 4415, Revised Statutes. The order of reference only provides that the referee is to report evidence to the court or judge, and does not in any way refer to the fact that it is agreed that a money judgment may be entered on the referee's report.

Chas. L. Heitman, for Respondent.

There is no rule of practice in the courts of equity requiring the intervention of a jury. The court may submit an is-

Argument for Respondent.

sue of fact to a jury, but when it does so the verdict is merely advisory and not binding upon the court. And a court of equity having jurisdiction of a case for one purpose will retain jurisdiction of the case for all purposes. (1 Pomeroy's Equity Jurisprudence, secs. 180, 181; *Hart v. Brown*, 27 N. Y. Supp. 74, 6 Misc. Rep. 238; *Hanley v. Waterson*, 39 W. Va. 214, 19 S. E. 536; *Price v. Oakfield etc. Co.*, 87 Wis. 536, 48 N. W. 539, 24 L. R. A. 333.)

Under sections 2223, 3237, 3238 and 3243, Code of Civil Procedure, it was competent and proper for the court to render judgment in accordance with the evidence in the case, as made and tried by the parties, and to treat the pleadings as amended for that purpose. It is the rule that where evidence is introduced without objection, the pleading will be considered amended to correspond with the facts proven, and the judgment will be based upon the evidence. (*Heater v. Penrod* (Neb.), 89 N. W. 762; *Enix v. Iowa Cent. R. Co.*, 114 Iowa, 508, 87 N. W. 417; *St. Louis etc. R. Co. v. Keller*, 10 Kan. App. 480, 62 Pac. 905; *Savings Bank v. Barrett*, 126 Cal. 413, 58 Pac. 914; *Sengfelder v. Insurance Co.*, 5 Wash. 121, 31 Pac. 428.)

Any variance between pleading and proof must be taken advantage of at the trial, and cannot be considered on appeal. (*Pryor v. Worford* (Ky.), 54 S. W. 838; *Jacobs v. Marks*, 183 Ill. 533, 56 N. E. 154; *Choquette v. Southerland R. Co.*, 152 Mo. 257, 53 S. W. 897.)

No variance between the pleadings and proof is material unless the adverse party has been actually misled to his prejudice, in maintaining his action or defense upon the merits. (*Wilcox Lumber Co. v. Ritteman*, 88 Minn. 18, 92 N. W. 472; *People's Nat. Bank v. Miles*, 65 Kan. 122, 69 Pac. 164.)

An amendment of pleadings will be implied where evidence is introduced without objection, and the case tried as if the proof as made was covered by the pleadings. (1 Ency. of Pl. & Pr. 641.)

Appellant was not in any way injured by the introduction of the evidence in this case on account of the state of the

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pleadings, and the rule is that the party to avail of any such supposed injury must present the matter at the trial, and show that he would be injured by the introduction of proof, and if he does not do so, then he never can. (*Hewitt v. Maize*, 5 Idaho, 633, 51 Pac. 607; *Hawkins v. Pocatello Water Co.*, 3 Idaho, 776, 35 Pac. 711; *Aulbach v. Dahler*, 4 Idaho, 322.)

AILSHIE, J.—This action was commenced in the early part of 1902 to secure an injunction and for damages in the sum of \$2,000. The defendant demurred and the demurrer was overruled; it thereafter answered, and by agreement of counsel for the respective parties the case was referred to a referee to take the evidence and report to the court. The referee commenced to take testimony on the fourteenth day of June, 1902, and evidence appears to have been taken in Spokane, Washington, as late as the seventh day of June, 1904. It was not filed in court, however, until the second day of February, 1906. On the date on which the referee's report was filed, the district judge made and filed his findings of fact and conclusions of law, and ordered judgment in favor of the plaintiff for the sum of \$3,500, and thereupon entered judgment accordingly. The defendant moved for a new trial and appealed from the judgment and order denying its motion. It appears that the plaintiff, Lindstrom, had two logging contracts with the appellant, the Hope Lumber Company, one known as the Kootenai contract and the other as the Pack river contract. The Kootenai contract was entered into on the twenty-fourth day of October, 1901, and by its terms Lindstrom agreed to cut, skid and bank in Kootenai slough all the white pine, fir and tamarack saw timber growing on a certain tract of land at a fixed price per thousand feet. Lindstrom began by building roads and laying in supplies and material for carrying out his contract, and during the meanwhile was purchasing considerable of his supplies from Butler & Culver of Sand Point. At the end of each month he paid his bill to Butler & Culver by check issued by the Hope Lumber Company. The last payment made

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was about the first of November. When he failed to make his payments, one of the firm of Butler & Culver interviewed the president of the Lumber Company, Mr. Field. Field endeavored to get Butler & Culver to carry the account, but at the same time told them that "Lindstrom was running behind, that he did not know whether he was going to get the logs out or not, and that perhaps they would have to take charge of the camp themselves." He also informed them that the company was "afraid Pete was coming out behind," etc. Some two or three such interviews took place between Mr. Butler of the Butler & Culver Company and Mr. Field of the Hope Lumber Company, and the result was that on the twenty-seventh day of January, 1902, Butler & Culver sued Lindstrom for about \$2,325, and caused an attachment to issue and be levied upon his property including supplies, bunkhouse, tools, horses, and one million one hundred thousand feet of logs. This property was taken possession of by the sheriff, and immediately thereafter the Hope Lumber Company instituted an action in replevin against the sheriff claiming all this property as belonging to the company. They gave a replevin bond and took possession of the property. The respondent Lindstrom thereupon commenced this present action against the Hope Lumber Company, charging that all the property replevied belonged to him except the sawlogs, and that for those he was entitled to the price per thousand feet agreed upon for his service in cutting, skidding and banking them. He charges by his complaint that the company by taking this property from him under a replevin proceeding was preventing his carrying out and completing the contract, and had damaged him to the extent of the value of the property they had taken and also to the extent of the profit that he could have reasonably realized from the completion of his contract. The order of reference in this case was made by the agreement and consent of both parties to the action, and in the order we find the following paragraph: "It is further ordered that the said hearing, at the option of counsel for either side engaged therein, shall embrace a full and complete inquiry into all of the contracts, business and

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accounts that have arisen or are existing between the parties to said action arising out of the contract set forth in plaintiff's complaint." At the hearing before the referee, the counsel for the respective parties entered into the following stipulation: "It is stipulated and agreed by and between the parties herein that a full and complete accounting of all the transactions between plaintiff and defendant covering the contract known as the 'Pack River Contract,' being considered the same as if it were a part of the complaint, a full and complete accounting of all the matters and things between plaintiff and defendant shall be had and taken, defendant reserving the right to introduce subsequent testimony in reference to damages stated in its answer.

"Counsel agree that the contract mentioned in the complaint is the Kootenai Contract, and by stipulation, the contract known as the 'Pack River Contract' is here now introduced in evidence, marked Plaintiff's Exhibit 'A.' "

Accordingly the evidence taken by the referee covered the contract and transaction known as the "Pack River Contract," and while there was no amendment of the pleadings, the order of reference and this stipulation were treated by the parties and the court as an amendment to the pleadings to the extent of covering all the business and transactions included in the other contract.

The first assignment of error made by appellant is directed against the action of the court in overruling defendant's demurrer. The grounds of the demurrer were: 1. That the complaint does not state facts sufficient to constitute a cause of action; 2. That there is a misjoinder of parties defendant in that Butler & Culver and Charles Dyer (the sheriff) were not joined as defendants; 3. That the complaint is ambiguous, unintelligible and uncertain. We do not think there was any error in overruling this demurrer. The complaint states a cause of action. On its face it does not show any reason why Butler & Culver or Dyer were necessary parties defendant. A suit for injunction should be commenced and prosecuted against the real party who is committing the wrong. It was not necessary for the plaintiff to join any other persons who

may have in the meanwhile had possession of his property, either rightfully or wrongfully, in an action to recover the property, or its value, and damages for its wrongful taking or withholding. It is true these parties would have been proper parties to the action, and upon the application of the defendant an order might have been entered requiring them to be brought in and made parties.

The complaint contains a great deal of argumentative matter that has no proper place in a pleading, but upon the whole it is sufficiently certain and definite to put the defendant to its answer.

Appellant assigns as error the action of the court in making and entering findings and judgment on the same day on which the referee's report was filed. It is urged by appellant that he had no time or opportunity to object to the report or any of the evidence, or to move to purge the testimony as reported by the referee. It is true that both parties were entitled to a reasonable time in which to move against this report or any part thereof, and to object to any of the evidence it contained. While it does not appear to have been filed until the day on which the findings were made and entered, it does appear that the last evidence was taken a year and a half prior to the filing of the report. This report was somewhere during that time, and if not in the hands of the judge, it was the duty of the litigants to see that it was submitted to him, and that some action be taken looking to the closing up of this suit. Attorneys for both sides had been present from time to time during the taking of testimony and knew its contents, and we think eighteen months was long enough for either party to move against any improper evidence contained in the report, and also time enough to submit any findings that they desired the judge to make.

Plaintiff assigns the action of the trial court in assessing damages and entering judgment thereon without submitting the question of damages to a jury, as error, and in support of that assignment cites *Stocker v. Kirtley*, 6 Idaho, 795, 59 Pac. 891. In that case this court in a *dictum* held that where a demand was made for a jury to assess damages in an equity

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case, the court should have submitted the question to a jury. In that case however, this court evidently meant to say that the trial court *may* submit the issue of damages to a jury instead of saying it *must* do so. (See *Christensen v. Hollingworth*, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211; *Burke Land & C. Co. v. Wells Fargo & Co.*, 7 Idaho, 42, 60 Pac. 87.) This is a very different case. Here there was not only no demand made for a jury, but we consider that the action of the defendant amounted to an effectual waiver of a jury. Defendant stipulated and agreed to the submission of all the differences in controversy between the parties to a referee, and agreed that the referee should hear the evidence on all questions and report the same to the court. We think this amounted to a waiver of a jury. Certainly the parties were not intending to take evidence and have it reported to the court with the expectation of the court calling a jury to hear such evidence read and assess damages. The remaining assignments of error are directed against the findings of fact and conclusions of law made by the court. The action was originally commenced to secure an injunction restraining the defendant from interfering with plaintiff and his property so as to prevent him carrying out and completing his contract for cutting, skidding and banking saw timber, and for damages as an incident to the main action. Before the case ended, however, it seems to have resolved itself into a suit for accounting and damages resulting from the wrongful seizure of certain of plaintiff's property in replevin. This transformation does not appear to have met with any protest or opposition from appellant until the case is brought to this court on appeal. Now, this latter condition of the issues cannot be gathered from the complaint and answer, but rather from the stipulation entered into by the attorneys at the time of taking proofs and the class and character of evidence actually submitted, apparently without any objection on either side. The findings were evidently drawn in line with the evidence submitted, and on the theory that the issues had been made which the evidence tended to establish. There is evidence in the record tending to establish each fact

found by the trial court, and the most that can be said of it from plaintiff's standpoint is that there is a substantial conflict, and under the established rule of this court in such cases the findings of the trial court could not be disturbed. This case is a very apt illustration of the danger and unwisdom of parties disregarding the established rules of pleading and amendments of pleadings and introduction of evidence. Here both parties seem to have agreed, irrespective of the condition of the pleadings, to let in all the evidence they had touching any matter of difference between them, whether pleaded or not. Litigants who are parties to this method of submitting differences and trying issues are left, as a result, in an unfavorable position for the purpose of presenting errors and grievances to an appellate tribunal. Appellant should not now be heard to complain of a condition to the existence of which it consented and contributed. In face of the stipulations entered into, one apparently in open court and the other before the referee, we must assume that every fact was at issue concerning which evidence was submitted. The record is neither assuring nor satisfactory as to the fifteen hundred dollar item allowed as damages alleged to have been caused by defendant preventing plaintiff from carrying out his contract. There is some evidence in the record, however, tending to support this finding, and in view of the condition in which we find the case we are constrained to confirm the judgment, and it is so ordered. Costs awarded in favor of respondent.

Stockslager, C. J., and Sullivan, J., concur.

ON REHEARING.

(January 5, 1907.)

STOCKSLAGER, C. J.—Appellant filed its petition for rehearing in this case. We find nothing urged in the petition that was not considered by the court in disposing of the case on the original hearing. A rehearing is denied.

Ailshie, J., and Sullivan, J., concur.

Points Decided.

(December 11, 1906.)

A. P. POWELL, Appellant, v. THE SPRINGSTON LUMBER COMPANY, a Corporation, Respondent.

[88 Pac. 97.]

DISTRICT COURT RULES—ORDER SUSTAINING MOTION IN DISTRICT COURT—PRESUMED TO HAVE BEEN MADE ON SOME GROUND STATED IN MOTION—INJUNCTION—MUST ISSUE WHEN SUMMONS ISSUES—NAVIGABLE STREAMS—RIGHTS OF THE PUBLIC THEREON.

1. The supreme court will not take judicial notice of the rules adopted by the district judges of the several districts of the state.

2. Where a rule of court in force in the district court is relied upon on appeal, it must be embodied in the record and presented to the appellate court the same as any other matter brought up by the record.

3. Where a moving party designates certain specified grounds in his motion, and the trial court grants the motion without specifying any ground upon which the same was granted, the appellate court will assume, as a matter of course, that the motion was granted upon some ground named therein, and if the order cannot be sustained on any ground named in the motion, it will be reversed.

4. Where the district judge granted a temporary injunction at the time of filing the complaint and the issuance of the summons, and thereby directed the defendant to appear at a time and place specified to show cause why the injunction should not be continued in force *pendente lite*, and the sheriff was unable to find the defendant corporation's statutory agent or anyone upon whom service of process might be made, and returned the writ unserved, and the judge thereupon issued a second order in the same form and to the same effect as the first, with the exception that the time fixed for the defendant to appear and show cause was extended to a more remote period, and such second order was returned unserved for the same reason given for failure to serve the first, and a third order was granted in the same form and to the same effect, except that the time for appearance was extended still further, and this latter order was duly served, the fact that no affidavits were filed prior to the issuance of the second and third orders is not a sufficient or legal ground for dissolving the injunction as being in violation of section 4289, Revised Statutes.

5. *Id.*—In such cases the legal discretion of the court has already been invoked and exercised in the first instance, and the

Argument for Appellant.

subsequent orders amount in substance and effect to nothing more than an extension of the time in which the defendant is required to appear and show cause.

6. Navigable streams are public highways over which every citizen has a natural right to carry commerce in the mode, manner and by the means best adapted to serve the purposes of the commerce in which he is engaged. In so doing he must have due consideration and reasonable care for the equal right of every other citizen upon the waters of such stream.

7. The construction and use of booms is a necessary adjunct to the floating of logs, and the right to float logs down a stream carries with it the necessarily resultant right of employing some reasonable means for intercepting them at their destination.

8. Under the provisions of section 835 of the Revised Statutes, it is made unlawful for any person to construct a dam or boom on any creek or river of this state without connecting therewith a sluiceway, lock or fixture sufficient to permit timber to pass around, through or over the same without unreasonable delay or hindrance.

9. One who constructs a boom or obstruction "across" a navigable stream of this state so as to "prevent" others driving logs past such boom or obstruction is liable in an action to abate the same as a nuisance and for damages caused by its maintenance.

(Syllabus by the court.)

APPEAL from the District Court of First Judicial District for Kootenai County. Hon. Ralph T. Morgan, Judge.

Action by the plaintiff for an injunction restraining defendant from maintaining a boom and obstruction across the Coeur d'Alene river and for damages. Temporary injunction issued, and thereafter dissolved on motion of the defendant. Plaintiff appealed from the order dissolving the injunction. *Reversed.*

John P. Gray and A. A. Crane, for Appellant.

Under the facts as set forth in the complaint and under the statutes of this state, the complainant was entitled clearly to the relief for which he asked. (Rev. Stats., sec. 835.)

All obstructions to the free use of navigable streams are prohibited by the law of the land. (Angell on Watercourses, 554; *Hart v. Albany*, 9 Wend. 571, 24 Am. Dec. 165.)

Argument for Respondent.

Any obstruction of a channel of a navigable stream which entirely impedes the natural and free passage of logs is *prima facie* unlawful and wrong. (*Watts v. Tattabawassee Boom Co.*, 52 Mich. 203, 17 N. W. 809.)

A boom company chartered to take and hold logs or persons desiring its services is bound to see that as to other log owners having lumber intended to be driven below the dam, the passage is not obstructed by the boom, and they are not justified in stopping by their boom any lumber except that which is destined to be stopped there. (*West Branch Boom Co. v. Dodge*, 31 Pa. St. 285.)

Riparian owners cannot, though they may own both sides of a navigable stream, construct booms entirely across the stream, since such booms would obstruct navigation. (*Stevens Point Boom Co. v. Reilly*, 46 Wis. 237, 49 N. W. 978; *Kretschmar v. Meehan*, 74 Minn. 211, 77 N. W. 41.)

In the absence of statutory authority there is no right to block a navigable stream by booms. (*Enos v. Hamilton*, 24 Wis. 658; *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 41 L. ed. 437, 20 Sup. Ct. Rep. 343.)

Courts of equity have jurisdiction to protect the rights of persons infringed upon by an obstruction to a navigable stream where the remedy at law is inadequate. (*Carl v. West Aberdeen Land & Imp. Co.*, 13 Wash. 616, 43 Pac. 890; *Stevens v. Point Boom Co. v. Reilly*, 46 Wis. 237, 49 N. W. 978.)

McClear & Burgan, for Respondent.

The allegations of the complaint do not state a *prima facie* right for the injunction, and do not allege any violation of the rights contemplated by section 835, Revised Statutes, and even though they were violated, the plaintiff has a plain, speedy and adequate remedy at law under section 836, Revised Statutes.

Section 4289, Revised Statutes, states: "The injunction may be granted at the time of issuing the summons, upon the complaint, and at any time afterward, before judgment, upon

affidavits. This of itself seems to be enough to show that the court could only grant an injunction after summons was issued upon affidavits showing that the same cause of action existed at the time the injunction was asked for as existed at the time the complaint was filed and summons issued. (*Falkenberg v. Lucy*, 35 Cal. 52, 95 Am. Dec. 76; *Smith v. Sterns Rancho Co.*, 129 Cal. 58, 61 Pac. 662.)

STATEMENT OF FACTS.

This is an appeal from an order dissolving a temporary restraining order issued upon the complaint. The plaintiff alleges that the defendant is a corporation maintaining and operating a sawmill at Springston, on the Coeur d'Alene river, in Kootenai county; that the plaintiff resides at Harrison at the mouth of the Coeur d'Alene river, and is engaged in the timber business; that the plaintiff is the owner of a large quantity of logs that have been cut on the Coeur d'Alene river and its tributaries above Springston, which he desires to float and drive down the Coeur d'Alene river to the mills at Harrison. He also alleges that he is engaged to drive a large quantity of saw timber belonging to other persons and corporations down the river for a consideration. It is also alleged that the Coeur d'Alene river is a navigable stream and serves an important public use, and has been used for floating timber and sawlogs and for other general purposes for a great many years. Paragraph 4 of the complaint charges the defendant with wrongfully, willfully and unlawfully obstructing the stream, and preventing either the free or reasonable use thereof for purposes of floating logs and timbers, or any other purpose, and is as follows: "That the defendant wrongfully, willfully and without any right to do so, has created, maintained and constructed across the said Coeur d'Alene river at the said town of Springston, which is situated about three miles from the mouth of said Coeur d'Alene river, a series of obstructions so as to prevent the floating of said logs of plaintiff or any logs down said stream past the said point where said obstructions are situated. That said ob

Statement of Facts.

structions consist of a boom and certain piling driven along the shore and in the river, by means of which obstructions all the logs coming down said river are stopped and taken from their natural course down the current of said stream and diverted and held in said boom of defendant." It is also alleged that at the time of the commencement of the action defendant wrongfully and unlawfully detained in its boom one hundred and twenty-six sawlogs and one boom stick belonging to the plaintiff, and that the defendant, by obstructing the stream and preventing the floating of logs past its boom, is causing plaintiff a damage of twenty dollars each day, and that such obstruction has been maintained from the first day of March, 1906, to the date of filing the complaint on June 28, 1906. Plaintiff prays for an injunction restraining and enjoining the defendant from further maintaining any obstruction in the stream so as to prevent the passage of logs and timber and for damages. Upon the commencement of this action and upon the verified complaint therein, the court issued a temporary injunction enjoining and restraining the defendant from the further maintenance of the obstruction in the stream. This writ was delivered to the sheriff, who thereafter returned the same unserved, for the reason that he was unable to find any officer or agent of the defendant corporation within the state upon whom he could serve the same. On the twenty-eighth day of July, another and further order in the same form and to the same effect as the first was issued by the district judge, and the same was thereafter returned by the sheriff unserved, for the same reason as given for the failure to serve the first order. Thereafter, and on the eleventh day of August, a further and third order was issued by the trial judge in the same form and to the same effect as the previous orders, and this order was thereafter duly and regularly served upon the defendant corporation. The defendant immediately thereafter moved the court upon the records and files for an order dissolving the temporary injunction upon two grounds: 1. That no motion was made to keep the same in force as required by rule

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19 of the rules of practice of the district court in and for the first judicial district; and 2. That the restraining order issued on August 11, 1906, was and is in violation of the statutes of the state of Idaho, section 4289, Revised Statutes of 1887, in this, that if granted after the time summons is issued it must be on affidavits. This motion was granted by the court and the injunction was dissolved. It does not appear in the order made by the judge upon which ground the motion was granted, or whether on both grounds.

AILSHIE, J. (After making statement of the case.)—Since the judge specified no grounds on which he based his order dissolving the injunction, it must be assumed upon this appeal that it was made on either one or both of the grounds named in the motion. The first ground, that no motion was made to keep the order in force as required by rule 19 of the rules of practice of the district court, is untenable here, for the reason that we cannot take judicial notice of what rules have been adopted by the district court. (Rev. Stat., sec. 5950; *Dours v. Cazentree*, McGloin (La.), 257; 11 Cyc. 739-744.) The rule relied on has not been brought to this court in the record, and we are therefore not informed as to its provisions. We doubt, however, if any valid rule could be enforced that would justify dissolving an injunction under this paragraph of the motion. The next ground assigned in the motion is equally untenable. It is contended by respondent in justification of the order of the court that under section 4289, Revised Statutes, where an injunction is granted on the complaint alone, it must be granted at the time the summons issues, and that it can never be granted thereafter upon the complaint alone. We think that contention is substantially correct, and in conformity with the provision of the statute. (*Thayer v. Bellamy*, 9 Idaho, 1, 71 Pac. 544.) The facts and circumstances of this case do not bring it within the prohibition of the statute. Here three several orders of injunction and as many writs were issued, but they were all in the same form and to the same effect, and the second and third amounted to nothing more than an extension of the time

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in which the defendant was required to show cause. The discretion of the court was brought to bear and was exercised at the time the summons was issued, and the judge issued the first injunction ordered. At that time he exercised the discretion vested in him to grant a temporary injunction. This order was timely issued, and only needed to be brought to the knowledge and notice of the defendant in order to be binding and obligatory upon it. The officer was unable to serve the writ issued under this order prior to the time named therein for the defendant to show cause. Upon the return of the writ showing that it had not been served on account of the inability of the officer to find the defendant's statutory agent, the court in substance merely extended the time previously designated for the defendant to show cause, and the same thing was done upon the return of the second order and writ unserved. It is true a new order was issued and a new writ under the seal of the court was delivered to the officer, but the only act performed by the judge in these instances was that of extending the time and naming a new date on which the defendant should show cause. This was not a violation of the provisions of section 4289, Revised Statutes, nor was it a violation of any other provision of law that has been brought to our attention. If the contention of the respondent in this case were correct, it might seldom be possible for a plaintiff to get a valid injunction issued upon his complaint, for although the order and injunction might be issued and a time fixed for the defendant to appear and show cause, nevertheless, under this condition, if the defendant could avoid service until after the expiration of the time designated in the order, the plaintiff would be unable to secure another order or extension of time without filing affidavits in support of his complaint. No good reason exists for such a practice and the law does not require it.

The appellant has devoted a large part of his brief to a discussion of the sufficiency of the equities pleaded to sustain the action of the court in granting an injunction thereon. The trial judge held that the complaint when filed did disclose such equities as would authorize the issuance of an in-

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junction. The sufficiency of the complaint or the exigency disclosed by the facts pleaded was not attacked by the motion to dissolve the injunction, nor was the order based on any such assumption. Since, however, counsel for respondent have argued on this appeal that "the complaint does not state a *prima facie* right for injunction," we will consider its sufficiency to the extent of determining whether or not it will support an injunction order. In this connection it is only necessary to determine the extent of plaintiff's rights in the waters of the Coeur d'Alene river, which is alleged to be a navigable stream, and the measure of duty the defendant, in the enjoyment of its rights, owes the plaintiff. Navigable streams are public highways, over which every citizen has a natural right to carry commerce, whether it be by boats or the simple floating of logs. The appellant has an undoubted right to float his logs and timber down the Coeur d'Alene river, but in doing so he must have due consideration and reasonable care for the equal right of defendant. On the other hand, defendant has an unquestionable right to embark in the same or any other lawful transportation business on the waters of that stream. (1 Farnham on Waters and Water Rights, 154-161.) The construction and use of booms is a necessary adjunct to the floating of logs; without them it would frequently be impossible to deliver the logs where wanted for use. The right to float logs down a stream carries with it the necessarily resultant right of employing some reasonable means for intercepting them at their destination. The right of a riparian owner to use a stream implies the necessity as well as right to pass from the shore to the navigable waters of the stream, and this in turn must require some effective means or medium by which to reach such point for loading or unloading the commercial and floatable commodity. This is the rule of law on which we decided the case of *Small v. Harrington*, 10 Idaho, 499, 79 Pac. 461, cited by respondent, in which Mr. Justice Stockslager, speaking for the court, said: "No one has the right to arbitrarily obstruct a stream to the detriment or injury of his neighbor. Each one is entitled to the free and reasonable use of the navigable streams of this state, and may

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place such reasonable obstructions on the stream, so long as they serve a useful and beneficial purpose, and leave a reasonable use for others interested. . . . If an obstruction impairs or renders more difficult the navigation, without destroying it, an individual has no rightful cause for complaint, because he has no right to insist on the best possible accommodation." In the case at bar it is charged that defendant has built its boom and obstructions "across" the stream so as to "prevent" others driving logs past such boom and obstruction. This is unlawful, and in violation of the natural rights of plaintiff and every other citizen who desires to use the stream for purposes of navigation (*Stevens Point Boom Co. v. Reilly*, 46 Wis. 237, 49 N. W. 978), and is specifically forbidden by section 835, Revised Statutes, in the following language: "No dam or boom must be hereafter constructed or permitted on any creek or river, unless said dam or boom has connected therewith a sluiceway, lock or fixture sufficient and so arranged as to permit timber to pass around, through or over said dam or boom without unreasonable delay or hindrance."

It is argued by counsel for respondent that since plaintiff has failed to specifically allege that the defendant has not connected with his boom any sluiceway, lock or fixture to permit the floating of logs around or through the boom without unreasonable delay, that the complaint for that reason is insufficient to support an injunction. The condition of this case does not make it necessary for us to pass upon the burden of pleading in this instance, but it would seem, however, that the necessity for pleading a negative does not fall upon the plaintiff in this case, but rather upon the party who relied upon his compliance with the exception. Here the plaintiff has charged the defendant with having constructed and maintained such boom and obstruction "across" the stream so as to effectually "prevent" floating of logs past such obstruction, and that this condition had existed for a period of nearly four months prior to filing the complaint. This, at least, in the language of respondent's counsel, "made a *prima facie* case for the plaintiff," and if the defendant has in fact pro-

vided sluiceways or locks in conformity with the statute, it may show that fact at the proper time. Respondent further contends that under the provisions of section 836 of the Revised Statutes, the plaintiff could not maintain his action until after he had given thirty days' notice as provided by that section. Section 836 is as follows: "Any boom or weir in or over any creek or river so constructed as to prevent the passage of logs or lumber is a public nuisance, which may be abated unless a suitable sluiceway, lock or passage be made thereon, within thirty days after written notice given by any person interested, and any person owning, holding or occupying such boom or weir is liable to pay five dollars for every day the same remains in or over said creek or river, after thirty days' notice to remove the same, and be liable for any damages sustained by individuals by reason of said boom or weir." Respondent misapprehends the meaning and purpose of this latter section. The legislature passed the statute containing the present sections 835 and 836 on February 5, 1885. By provisions of section 835 it was intended to prevent any dam or boom being constructed or erected after the passage of the act, without being first provided with sluiceways, locks or fixtures as provided by the act. But prior to the passage of that act there had been constructed a number of dams and booms in various streams of the territory, without being connected either with sluiceways or locks, and it was the purpose of section 836 to allow the owners of all such booms or dams or weirs as had been previously constructed a period of thirty days after receiving notice from any person interested in which to make the necessary alterations and construct a sluiceway, lock or fixture in conformity with the statute. This construction is made perfectly clear by reverting to the act of February 5, 1885 (Sess. Laws 1885, p. 178), as by doing so it will be seen that in copying section 7 of the act which corresponds with section 836 of the Revised Statutes, three words have been left out, and the section as originally enacted commences as follows: "Any boom or weir that is now in or over any river," etc. No contention is made in this case that the obstruction in the Coeur d'Alene river is one that was placed

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there prior to the passage of the act of February 5, 1885. Of course if it should develop upon the further hearing of this case that that is the fact, then the defendant would undoubtedly be entitled to the thirty days' notice before it would be liable in an action under the statute.

The complaint charges the defendant with violating a plain and undeniable equity vested in plaintiff, and one which must properly appeal to the sound discretion of a court of equity. The motion made in the lower court to dissolve the injunction should have been denied. The order dissolving the temporary injunction is reversed and the cause remanded for further action in conformity with the views herein expressed. Costs awarded to appellant.

Stockslager, C. J., and Sullivan, J., concur.

(December 13, 1906.)

FRANK BUCKLE, Appellant, v. WM. McCONAGHY, Respondent.

[88 Pac. 900.]

MOTION FOR NEW TRIAL—STIPULATION WAIVING NOTICE—ORDER GRANTING NEW TRIAL—GROUNDS ON WHICH GRANTED—CONFLICT OF EVIDENCE.

1. Where the attorneys for the respective parties have signed a stipulation waiving notice of the time and place of hearing and passing upon a motion for a new trial, the trial judge will be justified in hearing and passing on the same without notice to the adverse party.

2. Where the trial court grants a new trial without designating the grounds upon which the order is based and an appeal is prosecuted from such order, the appellate court will only examine the assignments of error made in the lower court and the grounds of the motion for a new trial to the extent of ascertaining whether or not the order can be sustained on any ground named in the motion and assignments and specifications of error.

Argument for Respondent.

3. Where there is a substantial conflict in the evidence, and the trial judge who heard the case grants a new trial, the order will not be disturbed on appeal.

(Syllabus by the court.)

APPEAL from the District Court of the First Judicial District for Kootenai County. Hon. Ralph T. Morgan, Judge.

Judgment for plaintiff. Defendant moved for a new trial and his motion was granted. Plaintiff appealed from the order granting a new trial. *Affirmed.*

C. L. Heitman, for Appellant.

The district judge should at least have made some inquiry or given some notice to appellant's attorney of the fact that he was considering a second motion for a new trial in the cause.

The adverse party is entitled to notice of the time and place of the hearing for a new trial, and to be present at the hearing and present his side of the case. (*Peter v. Kalez*, 11 Idaho, 553, 83 Pac. 526; 37 Century Digest, "New Trial," sec. 314, and cases cited.) The motion or application must be made by the moving party, and there must be a "hearing." (Idaho Rev. Stats. sec. 4442; 1 Spelling on New Trial, sec. 378; *De Gaze v. Lynch*, 42 Cal. 363.)

"Owing to the statutory character of the jurisdiction, there is no such thing as a *pro forma* ruling on the motion." (1 Spelling on New Trial, sec. 378; *Ranney v. Railroad Co.*, 67 Vt. 594, 32 Atl. 810.)

Where a motion for a new trial is granted, the judge or the court should state the grounds upon which the motion is granted. (Hayne on New Trial, p. 499, sec. 167a.)

R. E. McFarland and Edwin McBee, for Respondent.

"On motion for a new trial or on appeal, every intendment is in favor of the judgment or ruling of a court of record. The party complaining must show error affirmatively." (*Hazard v. Cole*, 1 Idaho, 276.)

Argument for Respondent.

An order granting a new trial will not be reversed on appeal unless it is made to appear that it has been a manifest abuse of discretion in granting a new trial. (*Brossard v. Morgan*, 6 Idaho, 179, 56 Pac. 163; *Jacksha v. Gilbert*, 4 Idaho, 738, 44 Pac. 55; *Jones v. Campbell*, 11 Idaho, 353, 84 Pac. 510.)

It is not necessary, nor is the court required in granting a new trial, to incorporate in the order the grounds or reason therefor, and it is the established rule that where a new trial is granted, and the order states specifically the ground upon which it is made, and the appellate court finds that the ground or reason so stated is not sufficient, and the record discloses other grounds or reasons not stated in the order, entitling the mover to a new trial, such order will be affirmed. (*Piercy v. Piercy*, 149 Cal. 163, 86 Pac. 507; 1 Spelling on New Trial, 399.)

While the judge is compelled to submit the question of credibility to the jury because he cannot dispose of it as a matter of law, yet by submitting it to the jury he does not lose control over the verdict, nor become deprived of his rights, nor limited in his duty to set it aside upon any of the statutory grounds when such a course becomes necessary. (*Jacksha v. Gilbert*, 4 Idaho, 738, 44 Pac. 555; *Brossard v. Morgan*, 6 Idaho, 479, 56 Pac. 162.)

Where a case is tried by a jury, if the judge is not satisfied with the verdict and is convinced that it is clearly against the weight of evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. (*Dickey v. Davis*, 39 Cal. 565; *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. ed. 98; *Stevens v. Irwin*, 15 Cal. 503.)

"The rule that where there is a substantial conflict in the evidence the supreme court will not grant a new trial because the verdict is against the weight of evidence, does not apply to the court below in which the trial was had. There, if the judge is satisfied that the verdict is against the weight of evidence, he should grant a new trial, even if there is a conflict in the evidence." (*Jones v. Campbell*, 11 Idaho, 353, 84 Pac. 510; *Sherman v. Mitchell*, 46 Cal. 577; *Gerold v.*

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Brunswick, 67 Cal. 124, 7 Pac. 306; *Pico v. Cohn*, 67 Cal. 258, 7 Pac. 680.)

AILSHIE, J.—This case has been here once before on appeal (83 Pac. 525) and was reversed on the grounds that a new trial had been granted prior to the settlement and allowance of the statement that was used on such motion. After the *remittitur* went down the trial judge took up the motion for a new trial and granted the same, and the plaintiff has again appealed from the order. As will be seen from an examination of the former opinion of this court, the respective counsel had entered into a stipulation prior to settlement of the statement, whereby they each waived notice of the time and place of submission of motion for new trial and also the right to make an argument on such motion. After the case was reversed and remanded the trial court took up the motion for a new trial and considered and passed upon it without causing any further notice to be given to plaintiff's attorney. Appellant complains of this action, and insists that he should have had notice, and in support thereof cites *Peter v. Kalez*, 11 Idaho, 553, 83 Pac. 526, where this court said: "The adverse party is entitled to notice of time and place of the hearing on a motion for a new trial and to be present at the hearing and present his side of the case." This latter opinion states the rule of practice as established in this state, and, but for the stipulation entered into by counsel in the case at bar, he would have been entitled to the statutory notice and an opportunity to be heard on the motion. The stipulation, however, was still in force, and so long as it remained in force and effect the trial court had a right to treat it as a waiver on the part of plaintiff's counsel of the right to notice and a hearing thereon. Had plaintiff desired to be heard on the motion when it came up the second time after the case had been reversed on appeal, he might have given notice to the adverse party of his intention to avoid that stipulation and have filed proof thereof with the clerk of the court, and he would have thereafter undoubtedly been entitled to notice as though no stipulation had been entered into.

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The motion for a new trial in this case was made on assignments of fifty-five errors as having been committed in the admission and rejection of evidence, and giving and refusing instructions to the jury, and on four specifications of insufficiency of the evidence to support the verdict and judgment. The court granted the motion and ordered a new trial without designating upon what grounds he made the order. In such case it will be presumed as a matter of course that it was made on some one or all of the grounds specified in the motion. (*Powell v. Springston Lumber Co.*, ante, p. 723, 88 Pac. 97.) Since this is an appeal from the order granting the motion, it is only necessary for us to ascertain whether or not the order can be sustained on any ground named in the motion and assignments and specifications of errors. It would be otherwise if this were an appeal from an order denying the motion. In that event it would become necessary for us to examine all the assignments and determine whether there was merit in any of them. We have examined the evidence in this case and are satisfied that the action of the trial court must be affirmed. This was an action by a husband to recover damages from the defendant for the alienation of his wife's affections. The jury returned a verdict of \$8,000, and judgment was entered in accordance therewith. Many facts and circumstances shown by plaintiff were admitted by defendant, but in explanation thereof he, on the contrary, proved that he had in the meanwhile married plaintiff's daughter, and that his frequent visits to plaintiff's home were in fact made for the purpose of seeing the daughter instead of her mother, and that the result of his frequency at the Buckle home was his marriage to their daughter. At any rate, it is conceded that the defendant is plaintiff's son in law, and the latter is charged with alienating his mother in law's affections. The plaintiff established the fact, however, that after defendant's visits became the usual order of things, his wife grew cold and cruel to him, and that it finally became impossible for him to live with her, and that he later obtained a divorce on the grounds of extreme cruelty. A further re-

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cital of the evidence here can serve no useful purpose. It is sufficient to say that there is a substantial conflict, and the rule is, that where the evidence presents a substantial conflict, and the trial court, who saw and heard the witnesses and saw and heard all that was done and said in the case, has granted a new trial, his order will not be disturbed on appeal. (*Jones v. Campbell*, 11 Idaho, 353, 84 Pac. 510; *Jacksha v. Gilbert*, 4 Idaho, 738, 44 Pac. 555; *Brossard v. Morgan*, 6 Idaho, 479, 56 Pac. 162.) Likewise, where there is a substantial conflict, and the trial court has denied the motion for a new trial, his order will not be disturbed. The order granting a new trial must be affirmed, and it is so ordered. Costs are awarded to respondent.

Stockslager, C. J., and Sullivan, J., concur.

(December 14, 1906.)

W. D. ROBBINS, Respondent, v. LESLIE A. PORTER and
LOLO C. PORTER, Appellants.

[88 Pac. 86.]

**SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—CONFLICTING EVIDENCE—
SUFFICIENCY OF COMPLAINT.**

1. A contract to convey real estate will be enforced when it is shown that a deed was executed and left in the hands of the attorney of the grantor for inspection by the grantee, and after such inspection the grantee was willing to accept the deed, and had already paid the purchase price.

2. A deed properly executed and left with the attorney of the grantor of real estate is sufficient to remove the bar of the statute of frauds in an action for specific performance where the purchase price has been paid.

3. Where the evidence is conflicting and the case is tried to the court, and it appears from the transcript that the judgment is fully justified by evidence, under a long-established rule of this court,

Argument for Appellants.

even though the case be for specific performance, the judgment will not be reversed.

4. A complaint that fully sets out the contract for the conveyance of real estate, although the original contract was verbal, that is afterward merged into a different contract which is evidenced by a deed left in the hands of the attorney of the grantor for inspection of the grantee, is sufficient upon which to base a judgment for specific performance.

(Syllabus by the court.)

APPEAL from the District Court of Second Judicial District for Nez Perce County. Hon. Edgar C. Steele, Judge.

Action for specific performance of a contract to convey real estate. Judgment for plaintiff, from which, and an order denying a motion for new trial, defendants appealed. *Affirmed.*

Geo. W. Tannahill, for Appellants.

The allegations contained in the complaint are insufficient to take the case out of the statute of frauds, involving as they do the title to the real estate and the specific performance of a contract for the conveyance of the same from the appellants to the respondent. This contract is not based upon any written instrument, or any promise whereby any part of the consideration was paid, or any memorandum in writing signed by the parties to this action. Allegations of part performance are insufficient to take the case out of the statute, and the objection to the introduction of any evidence in support of the allegations contained in the complaint should be sustained. (Wood on Statute of Frauds, 820, and cases cited; *Wood v. Farmare*, 10 Watts (Pa.), 204.)

A mere contract or a covenant to convey at a future time on the purchaser to perform certain acts does not create an equitable title. It is only when the purchaser performs or tenders performance of all the acts necessary to entitle him to a deed that he has an equitable title and may compel a conveyance. Prior thereto he *has at best only* a contract for

land, *when* he shall have performed his part of the agreement. (Warvelle on Vendors, 188; *Chappell v. McKnight*, 108 Ill. 570.)

A party in default has no standing in equity to compel performance by another party similarly situated. *This is one of the best known rules governing this branch of the law.* Therefore, he who seeks to enforce a contract as against others must be himself without default, and ready and willing to comply. (Warvelle on Vendors, 2d ed., sec. 756; *Bishop v. Newton*, 20 Ill. 175; *Brown v. Cannon*, 5 Gilm. (10 Ill.) 174.)

Daniel Needham, for Respondent.

Undelivered deeds, and deeds delivered in escrow are sufficient written evidence of the existence of a contract to be enforced as a contract between the parties. (*White v. Breen*, 106 Ala. 159, 19 South. 59, 32 L. R. A. 127; *Rutenberg v. Main*, 47 Cal. 213; *Salmon Falls Mfg. Co. v. Godard*, 14 How. 447, 14 L. ed. 493.) *Motion for nonsuit on account of insufficiency of evidence is waived by the subsequent introduction of testimony by the mover.* (*Chamberlain v. Woodin*, 2 Idaho, 642, 23 Pac. 177; *Bradley v. Poole*, 98 Mass. 169, 93 Am. Dec. 144; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; *Accident Ins. Co. v. Crandal*, 120 U. S. 530, 30 L. ed. 740, 7 Sup. Ct. Rep. 685.) A finding of fact by the trial court is conclusive on appeal, there being evidence to support it. (*Curtin v. Harvey*, 120 Cal. 620, 52 Pac. 1077; *Anderson v. Johnson*, 120 Cal. 657, 53 Pac. 264; *Yore v. Seitz* (Cal.), 57 Pac. 886.) Where the evidence is conflicting the findings of the lower court will not be disturbed. (*Connolly v. Wicks* (Cal.), 51 Pac. 37; *Barker v. Gould*, 122 Cal. 240, 54 Pac. 845; *Spitler v. Kaeding*, 133 Cal. 500, 65 Pac. 1040; *Prince v. Kennedy* (Cal. App.), 86 Pac. 609; *Spaulding v. Cocur d'Alene Ry. & Nav. Co.*, 5 Idaho, 528, 51 Pac. 408.)

STOCKSLAGER, C. J.—This is an action for the specific performance of a contract to convey land. It is alleged in

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the complaint that in November, 1903, plaintiff and defendant entered into a contract, wherein plaintiff was to procure from Nora Hart, Cora Jackson, her husband, William Jackson, Ellen Winnier and Dunbar Winnier, her husband, deeds to all their rights and equities in certain lands in Asotin county, Washington, for defendant, and for the procuring of said deeds defendant agreed to pay to plaintiff \$1,500. It is then alleged that plaintiff procured such deeds, and there was a payment of \$250 to plaintiff by defendant on the contract; that subsequent to making the foregoing contract and performing the deeds aforesaid, and the payment of said \$250 to plaintiff by defendant, Leslie A. Porter, to wit, on or about the — day of March, 1904, plaintiff and Leslie A. Porter modified their former agreement, and entered into another agreement wherein said Leslie A. Porter agreed to execute and deliver to plaintiff, in full payment of said balance of \$1,250 due plaintiff from defendant for procuring said deeds, a good and sufficient warranty deed to certain lands in Nez Perce county, covering about three and one-half acres; that such lands were surveyed by the county surveyor of Nez Perce county at the instance of defendant Leslie A. Porter, and defendants executed their deed to said premises to plaintiff for the consideration of the said sum of \$1,250 balance due on the original contract, and put plaintiff in the quiet and peaceful possession thereof; that at the time of making said subsequent agreement, survey and deed, the premises were occupied by one Miss Bashor, as tenant, who paid the rental to defendant, Leslie A. Porter, who turned the same over to plaintiff; that defendant, Leslie A. Porter, has refused, and still refuses, to deliver said deed to plaintiff, although the full purchase price of said premises has been paid by plaintiff, and plaintiff put into possession of said premises, and the delivery of said deed requested by plaintiff of defendant L. A. Porter; that Lolo C. Porter is the wife of Leslie A. Porter. The prayer is that defendants be ordered and adjudged to deliver to plaintiff the deed they executed and agreed to deliver, and if they have otherwise disposed of the

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property or encumbered the same, that plaintiff have judgment against defendants for the sum of \$1,250.

The defendants answered this amended complaint and denied the original contract set out in the complaint; also that plaintiff procured the deeds as alleged in the complaint, and deny generally all the allegations of the complaint excepting the allegation that Leslie A. Porter and Lolo C. Porter are husband and wife. For a further defense defendants aver that on or about the tenth day of March, 1903, plaintiff represented to defendant that he had powers of attorney from all the heirs having any property rights or interest in the property in Asotin county, Washington, for which plaintiff alleges that he procured the deeds; that the plaintiff did not have such power of attorney, and could not have procured such title to said lands, and did not know the persons in whom the title was vested, and did not, and could not, procure the title therefor to said land, or any part thereof, except the title and interest of one Nora Hart, an undivided one-twelfth interest in and to said land, and the right, title and interest of all other persons owning the remaining eleven-twelfths interest the plaintiff never did procure for defendant, and defendant lost nearly all the other interests, and was obliged to sell out and dispose of the interests that he had secured in and to said land, which was too inconsiderable for any use whatever, and because he could not procure the other interests which the said plaintiff had agreed to procure for him, and which he did not, and never could, procure; that plaintiff never had any power of attorney whatever from the heirs owning a larger portion of the interest in said land, and was never in any position to deal with them in any way whatever and other interests, to wit, the interest of Cora Jackson née Cora McBeam, for which he claimed to have a power of attorney to act, has been conveyed and disposed of by said Cora Jackson and William Jackson, her husband, prior to said plaintiff having any authority whatever to convey or to deal with the same. It is then averred that defendant has been damaged in the loss of said property, and by virtue of the

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representations and inability of said plaintiff to secure for him and convey said property to defendant in the sum of \$5,000, for which amount he demands judgment.

Plaintiff answered the separate defense of defendants by denying each and all of the averments thereof. Defendant, Leslie A. Porter, filed his cross-complaint in which it is alleged that he is the owner and entitled to the immediate possession of the three and one-half acres of land in dispute, and alleging that on or about the twenty-second day of August, 1904, plaintiff, without any right, title or authority, entered into and upon said land and ejected his tenant, Miss Sadie Bashor, and cross-plaintiff, and ever since has by force and threats excluded and kept off from said land cross-plaintiff, and since last-mentioned date has taken from said place all of the fruits and products grown thereon, the rents, issues and profits thereof, without any right, title or authority, to the damage of cross-plaintiff in the sum of \$50, for which amount he demands payment and for the immediate possession of said premises. All of the allegations of this cross-complaint are denied by plaintiff, and he avers that he has fully paid defendant Porter therefor, and was put into possession thereof by said defendant, and is now in such possession by reason thereof and no other.

A jury was waived and trial to the court, judgment for plaintiff entered and filed January 15, 1906. The court found that the contract as alleged in plaintiff's complaint was entered into by plaintiff and defendant, Leslie A. Porter, on or about November 10, 1903; that in pursuance of such agreement plaintiff procured the deeds and delivered them to Leslie A. Porter, and that said Porter accepted them, had them filed for record and duly recorded in the office of the recorder of the county of Asotin, state of Washington; that only \$250 of the contract price has been paid, leaving a balance due from defendants to plaintiff of \$1,250; that subsequent to procuring said deeds and delivery of same by plaintiff to defendant and the payment of said \$250, to wit, on or about January 28, 1904, plaintiff and defendant, Leslie A. Porter,

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entered into another and second agreement, wherein and whereby said defendant agreed to and promised to execute and deliver to plaintiff, in full payment of said balance of \$1,250 due plaintiff for procuring said deeds, a good and sufficient warranty deed to certain lands in Nez Perce county, Idaho, plaintiff agreeing to accept, in full payment of \$1,250, the same lands, which second agreement was evidenced by a memorandum in writing and signed and acknowledged by said defendants, and is a warranty deed to said premises, and contains the terms of said agreements and a correct description of the property agreed to be so conveyed. The findings contain a full copy of the deed which is the ordinary form of warranty. When the plaintiff had concluded his evidence, defendants moved for a new trial, alleging that "plaintiff had wholly failed to prove any of the material allegations alleged in the complaint; that the evidence affirmatively shows that the plaintiff wrongfully took possession of the tract of land belonging to the defendants, and that no agreement, in writing or otherwise, had existed between the plaintiff and defendants for the conveyance of the tract of lands, and that none of the allegations of the complaint have been proven, and that the defendants ask permission to proceed on their cross-complaint and allegations therein contained for the possession of the land." This motion was overruled.

Counsel for appellant assigns a number of errors occurring at the trial, but in his brief makes the following statement: "These assignments of error may very properly be discussed and considered as one assignment, . . . for the reason that they relate to the insufficiency of the evidence to sustain the findings of fact, conclusion of law and decree." Almost the entire brief of learned counsel for appellant is directed to a discussion of the evidence and an effort to show wherein it is insufficient to support the findings and judgment for specific performance. He insists that his motion for nonsuit should have been sustained, for the reason that the evidence did not support the allegations of the complaint, and that he should have been permitted to submit his proof on his cross-

complaint for possession of the premises in Nez Perce county, and for damages for wrongful detention. This court very recently decided that where a motion for a nonsuit was interposed at the close of the evidence for the plaintiff, if denied, and the defendant thereafter offered evidence in defense he waived his rights under his motion unless renewed at the close of all the evidence. (*Shields v. Johnson*, ante, p. 329, 85 Pac. 972.)

It is shown by the record in this case that defendants not only offered proof in support of their cross-complaint, but met the issue and evidence of the plaintiff as offered in support of his complaint, hence they fall under the rule announced long since in this state; indeed, it was the rule before we were admitted as a state, and has been followed down to the present time. The authorities are referred to in *Shields v. Johnson*, supra, not only of this state, but other jurisdictions as well.

Counsel for appellant insists that "allegations of the complaint are insufficient to take the case out of the statute of frauds, involving as they do the title to real estate and the specific performance of a contract for the conveyance of the same from the appellants to the respondent." He says: "This contract is not based upon any written instrument or any promise whereby any part of the consideration was paid, or any memorandum in writing signed by the parties to the action." It is true that courts of equity will not enforce a contract for specific performance unless its terms are plain and unequivocal and the party seeking its performance is without fault. With this statement we will ascertain what is shown by the record before us. It is not disputed that appellant, Leslie A. Porter, and respondent entered into a contract whereby respondent was to procure deeds to certain real estate in Asotin county, Washington, for said appellant, and was to receive \$1,500 for his services in procuring the same. This contract was a verbal one, but is admitted by the pleadings, the dispute being as to just what respondent was to procure for appellant, Leslie A. Porter, appellant insisting that

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the contract was for all the interest in the land described in the pleadings, consisting of one hundred and sixty-four acres, and that respondent represented to him that he had powers of attorney from all the heirs, and could and would procure good and sufficient warranty deeds from all of them. On the other hand respondent insists that he only contracted to procure deeds from Cora Jackson, Nora Hart and Ellen Winnier. That he procured such deeds and delivered them to appellant; that he accepted them and had them recorded; that Porter paid him on such agreement the sum of \$250; that subsequent to the delivery of such deeds and the payment to him of the \$250 respondent testifies another agreement was entered into by himself and appellant, Leslie A. Porter, by the terms of which he was to receive a good and sufficient warranty deed from defendants to a small tract of land in Nez Perce county, consisting of about three and one-half acres, with a house and other improvements thereon, and that he was to accept such tract of land in full payment of the balance of \$1,250 due him on the original contract; that the land was surveyed and he was placed in possession thereof by appellants; that they executed and acknowledged the deed after such survey, according to the terms of the last agreement and showed it to him. Again he testifies that after the land was surveyed Porter said to him: "Robbins, here is your land, take it." He says when Mr. Porter submitted the deed to him he said if the title was all right he would accept it; that Porter said: "'Robbins, I feel I ought to hold a little string over you; I am afraid that if I deliver this deed to you, you will sell that and leave the country, and I won't be able to find you, and I want you because you can procure proof for me, and I want to be able to get you.' I said, 'Mr. Porter, I paid for the deed and I want it.' . . . He says, 'We will put it in escrow.' I says, 'No, you can't put it in escrow with me; that deed is mine.'" Mr. Harry Harford testified that at the time the land in question was surveyed he was present and Mr. Porter said to him: "I have agreed to let Robbins have this piece of land that I am going to let

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you have, but I can give him other land in lieu of it; it don't make any difference to me." Mr. Eugene O'Neill was the first witness called for defendants. He testified that as attorney for Mr. Porter he prepared the deed from the Porters to Robbins for the tract of land in dispute. He corroborates the evidence of Robbins in some particulars. With reference to the deed to Robbins from the Porters he says he prepared it; says Porter left the deed with him to show to Mr. Robbins but not for delivery. There was no escrow agreement signed by them. After Mr. Robbins had examined the deed he afterward came and demanded the deed but its delivery was refused.

Appellant Leslie A. Porter testified. He insists that his first agreement with Robbins was that Robbins was to get a deed from all the heirs of the Timothy estate for which he would pay \$3,000, and that the heirs named by Robbins were Cora Jackson, Ellen Winnier and Nora Hart. The next day he met Robbins and told him that he had a memorandum that John Silcott had given him, showing that Maggie Timothy was an heir to the Timothy estate; that Robbins assured him that Maggie Timothy was not an heir and that the others named were all the heirs to said estate. He admits that the deed was executed according to a subsequent agreement as testified to by Robbins, and says it was to be placed in escrow and not delivered until Robbins complied with all his part of both contracts. In rebuttal Robbins positively denied the statement of Porter with reference to the escrow agreement, and in fact all of his testimony excepting wherein it corroborated or tended to corroborate his own. It will be seen that the record is bristling with denials and contradictions on the part of both Robbins and Porter. It is conceded by Porter that he entered into the two contracts set out in the complaint; that he wanted to purchase the Timothy land; that the consideration was agreed upon and \$250 paid on it; that after the second agreement the land was surveyed by the county surveyor, but that he did not employ him to do such work. The surveyor says both Robbins and Porter spoke to

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him about making the survey, but he does not remember which was the first to speak to him about it. It is a matter of little importance who first spoke to the county surveyor or asked him to do the work. It is enough if he did it—and that fact is not disputed—and the parties in interest were satisfied with the result of his labors. It is shown that the Porters afterward executed their deed to Robbins in conformity with the surveyor's report, and left it with Mr. O'Neill to submit to Robbins. O'Neill did so, and Robbins afterward demanded possession of the deed from O'Neill, which, at the instance of Leslie A. Porter, was refused.

This court has recently held that contracts of the character set out in the complaint in this action will be enforced without regard to the rule that requires a plaintiff who seeks to establish a trust in real property to make out his case "clearly and satisfactorily beyond a reasonable doubt." The old rule requiring such proof has been relaxed by the modern decisions and especially by this court. In *Morrow v. Mathews*, 10 Idaho, 423, 79 Pac. 196, Mr. Justice Ailshie has very ably discussed the old as well as the new rule governing this class of cases, and the authorities on both sides of the question are collected and discussed.

After carefully considering the evidence in this case, we think the findings of fact by the court were fully justified. Counsel for appellant insists that the complaint does not support the judgment. We cannot agree with this contention. It occurs to us that the amended complaint upon which the case was tried was full and complete, and that the judgment should be sustained, and it is so ordered, with costs to respondent.

Ailshie, J., and Sullivan, J., concur.

STOCKSLAGER, C. J.—Since writing this opinion counsel for appellant calls our attention to a recent decision of the supreme court of the United States, entitled *Oscar D. Halsell et al. v. Wm. Renfrew and R. J. Edwards*, 202 U. S. 287, 50

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L. ed. 1032, 26 Sup. Ct. Rep. 610. We have examined this case, and the facts are quite different. In the above case there was no part performance of any contract, so says the court. In the case at bar it is shown that certain ends were obtained under the original contract which was afterward merged into a new contract as found by the trial court, the original contract and the procurement of certain deeds under it, is considered by appellants, the entire dispute being with reference to that contract as to who the heirs of the Timothy estate were. It is also shown that the land in dispute was surveyed for respondent, and that appellants executed their deed for such land to respondent.

(December 14, 1906.)

In re FRANK NEIL.

[87 Pac. 881.]

CRIMINAL LAW—APPEAL—STAY OF PROCEEDINGS—CERTIFICATE OF PROBABLE CAUSE—NOTICE OF HEARING—SUPREME COURT RULE—MEANING OF "PROBABLE CAUSE."

1. Paragraph 3 of rule 27 of the rules of the supreme court requires that one who applies to a justice of the supreme court for a certificate of probable cause under section 8048, Revised Statutes, shall have first made application to the district judge who tried the case, or show good reason why he has failed to do so, and shall give five days' notice to the county attorney or attorney general of his intention to make such application.

2. The phrase "probable cause for the appeal," used in section 8048, Revised Statutes, does not mean that there is probable reason to suppose the judgment will be reversed, but rather means that the appellant has assigned or specified grounds on which he expects to rely that are open to doubt or honest difference of opinion, and over which rational, reasonable and honest discussion may arise—that the appeal must present some debatable question and is not merely frivolous and vexatious.

3. The right of appeal by a defendant in a criminal case is absolute, and in no respect dependent on his guilt or innocence, and

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where he is availing himself of this remedy with any degree of good faith and not as a pretext for delay, it would be manifestly unjust to inflict upon him the punishment while he is having the validity of the judgment judicially determined.

4. The right of admission to bail after conviction of a felony does not necessarily follow the right to have a certificate of probable cause issue.

(Syllabus by the court.)

ORIGINAL application made at chambers for a certificate of probable cause under section 8048, Revised Statutes. *Certificate granted and order approved by the court.*

John A. Bagley, for Appellant.

J. J. Guheen, Attorney General, and Edwin Snow, for the State.

AILSHIE, J.—In this matter an application was made to Mr. Justice Sullivan and the writer hereof at chambers, under section 8048, Revised Statutes, for a certificate of probable cause. After hearing the matter it appeared that a certificate of probable cause should issue, and it was accordingly granted. Since there seems to be considerable uncertainty and doubt among the members of the bar as well as the trial judges of the state as to the correct practice in the matter of applications for certificates of probable cause, and some of the trial judges appearing to have declined to issue such certificates in any case of conviction in their respective courts, it has appeared necessary that we file an opinion in this case announcing the rule of law as well as of practice to be followed in this state.

The applicant, Frank Neil, was convicted and sentenced to serve a term of ten years in the state penitentiary. He thereupon moved for a new trial, which was denied, and then appealed to the supreme court from the judgment and order. He at once applied to the district judge, Honorable Alfred Budge, for a certificate of probable cause under the provisions of section 8048, Revised Statutes, and his application

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was denied. It appears, however, from the showing made by petitioner, that the judge fixed the amount of the bond that defendant would be required to give in the event the supreme court, or a justice thereof, should issue a certificate of probable cause. The application was made here in conformity with paragraph 3 of rule 27 of the supreme court, which is as follows: "No application made to a justice of this court under section 8048, Revised Statutes, for a certificate of probable cause will be considered until the application has first been made to the judge who tried the case, or good reason for a failure to do so shown by affidavit, and in such cases the party intending to apply for certificate shall give at least five days' notice of his intention to make such application by service of notice thereof either upon the county attorney who tried the cause or the attorney general." The assistant attorney general stated at the hearing that he was of the opinion that this was a case in which a certificate should properly issue, and that he would not resist the application.

Section 8048 of the Revised Statutes, under which the application was made, provides as follows: "An appeal to the supreme court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases, upon filing with the clerk of the court in which the conviction was had a certificate of the judge of such court, or of a justice of the supreme court, that, in his opinion, there is probable cause for the appeal, but not otherwise." The meaning of the words "probable cause for the appeal" is the evident subject of dispute and controversy when such applications are made to the trial judges. The provision of our statute is the same as section 1243 of the Penal Code of California. (4 Deering, 1243.) The California statute has received very full and careful consideration by the supreme court of that state and in *Re Adams*, 81 Cal. 163, 22 Pac. 547, Chief Justice Beatty has so clearly defined the meaning of these words that we quote him at length as follows: "It would seem that, notwithstanding what has been said by this court respecting this and cognate provisions of the statute, the opinion must

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obtain to some extent that the expression 'probable cause for the appeal' is the equivalent of 'probable ground for the reversal of the judgment,' and, consequently, that the superior judge who has overruled the defendant's motion in arrest of judgment, or for a new trial, cannot, without stultifying himself, grant a certificate of probable cause.

"If it were true that there is no probable cause for an appeal except in a case where the judgment is probably erroneous, it would necessarily involve self-stultification for a judge, who by denying a new trial and pronouncing sentence has solemnly affirmed his belief in the validity of the judgment, to make a certificate implying that in his opinion the judgment ought to be reversed.

"The palpable absurdity of such a proceeding sufficiently demonstrates that the legislature could never have intended to require it—demonstrates, in other words, that the certificate which the superior judges are required to grant in proper cases cannot have the meaning supposed.

"What, then, is meant by the expression 'probable cause for the appeal'?

"We answer, as we have answered heretofore, it means only that there is presented a case that is debatable; a case that is not clearly and palpably frivolous and vexatious; a case upon which there may be an honest difference of opinion. (*People v. Valencia*, 45 Cal. 305; *Ex parte Hoge*, 48 Cal. 6.)

"This is all that is required. It matters not that the judge before whom the prisoner has been tried may be satisfied that his conviction is in every respect regular and valid (which, indeed, must always be the case before there can arise any necessity for an appeal); he is, nevertheless, bound to grant a certificate of probable cause, and stay the execution pending the appeal, unless the case is so clear as to admit of no rational doubt or serious discussion."

If, as intimated by the California court, the issuance of a certificate of probable cause were equivalent to saying that the judgment will probably be reversed, the statute authorizing

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such a certificate would become entirely meaningless and useless. If a trial judge believes that there is any reason why the judgment should be reversed or a new trial granted, it is made his duty to grant a new trial without entailing upon the defendant the necessity, burden and expense of an appeal. The fact that he denies a new trial is of itself a judicial determination, so far as his court is concerned, that there exists no good reason why the judgment should be reversed or a new trial granted. But section 8048 has no reference to such a condition either in point of law or fact. That statute must undoubtedly mean that if the appellant has assigned any error or specified any ground on which he expects to rely on appeal concerning which a doubt may exist, or over which an honest difference or a reasonable discussion may arise, then and in that case a certificate should issue. The trial judge must of necessity in every case believe that the verdict and judgment will be sustained; otherwise he would set them aside and grant a new trial. On the other hand, where it is clearly evident that the appeal is frivolous, as, for example, where the appellant has assigned no error and specified no ground recognized by law for granting a new trial, or in arrest of judgment, a certificate should not issue. In such case there would be no question presented over which an honest and fair difference of opinion could arise as to its merits. Another reason suggests itself in this connection. Both the constitution and statute guarantee to him the right of appeal from any judgment of conviction rendered and entered against him. (Const., art. 5, sec. 9; Rev. Stats., sec. 8042.) This right of appeal is in no respect dependent upon the guilt or innocence of the defendant. One guilty beyond all question of doubt is guaranteed the same right of appeal as if he were absolutely innocent. If innocent, and he should appeal and his innocence be finally established, it would be a grave and manifest injustice to have inflicted upon him the punishment prescribed by the judgment during the very time that he was prosecuting his appeal and establishing his innocence. On the contrary, even if he is guilty beyond the question of a

doubt, the state can suffer no injury on account of the execution of the judgment having been stayed, pending the final determination of his case on appeal. If not admitted to bail, he is in the meanwhile held in custody of the sheriff of the county where he committed the offense, and the term of his punishment will begin to run from the final determination of his case and his surrender to the warden of the penitentiary. In the meanwhile he will have served in the county jail during the period his appeal has been pending, and he will still have to serve the full period of his sentence. The idea seems to have prevailed in some degree, without any foundation in law therefor, that the issuance of a certificate of probable cause carries with it, as a matter of course, the admission to bail. This notion is entirely erroneous. The admission to bail is a matter entirely separate and independent from the issuance of a certificate of probable cause. While the defendant could not be admitted to bail prior to the issuance of such a certificate, on the other hand, a certificate may and should properly issue in many cases where the defendant should not be admitted to bail. (Rev. Stats., sec. 8104.) Indeed, it is true that in many cases that have come to this court, certificates of probable cause have been granted and the defendant has been refused admission to bail. In such cases he is held in custody in the county jail until his case is finally determined on appeal. In those instances the defendant takes his chances of having to serve that period in the county jail in addition to and over and above the period designated in the sentence and judgment against him. If he has not reasonable hopes of securing a reversal of the judgment, he will seldom take the chances of procuring such a certificate. As touching the various phases of this matter, see *People v. Lane*, 96 Cal. 596, 31 Pac. 580; *People v. Durrant*, 119 Cal. 54, 50 Pac. 1070; *People v. Gallanar*, 144 Cal. 656, 79 Pac. 378.

This matter has been considered by the court sitting with a full bench, and is fully concurred in by Chief Justice Stocklager and Justice Sullivan.

Argument for Respondent.

(December 15, 1906.)

MARTIN HECKMAN et al., Appellants, v. E. E. ESPEY,
Respondent.

[88 Pac. 80.]

PROSPECTING PARTNERSHIP—INSUFFICIENCY OF EVIDENCE—SUBSTANTIAL
CONFLICT—NEWLY DISCOVERED EVIDENCE—CUMULATIVE AND COR-
ROBORATIVE—DISCRETION OF TRIAL COURT.

1. Where there is a substantial conflict in the evidence, the findings of the trial court will not be disturbed.

2. The granting of a new trial is largely in the discretion of the trial court, and when based on affidavits of newly discovered evidence that are only corroborative and cumulative of the evidence introduced on the trial, the decision of the court on the motion for a new trial will not be disturbed.

(Syllabus by the court.)

APPEAL from the District Court of Second Judicial District for Idaho County. Hon. Edgar C. Steele, Judge.

Action to establish prospecting partnership. Judgment for defendant. *Affirmed.*

Forney & Moore, for Appellants, cite no authorities.

Scales & Taylor, for Respondent.

Where evidence is conflicting, and the lower court has decided such conflicting issues of fact, the appellate court will not disturb the findings of the lower court; the courts of all the states are in accord on this doctrine; and this court has repeatedly so held. (*Deeds v. Stephens*, 10 Idaho, 332, 79 Pac. 77; *Robertson v. Moore*, 10 Idaho, 115, 77 Pac. 218; *Abbott v. Reedy*, 9 Idaho, 577, 75 Pac. 764; *Cowden v. Finney*, 9 Idaho, 619, 75 Pac. 765; *Cowden v. Mills*, 9 Idaho, 626, 75 Pac. 766.)

On verdict on conflicting evidence, see *Simpson v. Remington*, 6 Idaho, 681, 59 Pac. 360; *Bonner v. Powell*, 7 Idaho, 104,

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61 Pac. 138; *Kendrick State Bank v. Northern Pac. Ry. Co.*, 10 Idaho, 483, 79 Pac. 457; *Spencer v. Morgan*, 10 Idaho, 542, 79 Pac. 459; *Gumaer v. White Pine Lumber Co.*, 11 Idaho, 591, 83 Pac. 771; *Turmes v. Kiesner* (Idaho), 85 Pac. 212.

The appellate court will give the finding of the trial court the most liberal construction the language will permit, to sustain a judgment found therein. (*Eastwood v. Standard Mines etc. Co.*, 11 Idaho, 195, 81 Pac. 382.)

The measure of evidence required to enforce a trust in mining claims under a parol agreement is laid down by this court in *Morrow v. Matthew*, 10 Idaho, 423, 79 Pac. 196; and the evidence in such case must be clear and satisfactory; and the court in that case say on page 201: "Evidence entirely clear and convincing to the trial court, who saw and heard the witnesses, might, when in cold type upon the record, leave doubts in the minds of the members of the appellate court; but I do not think they should reverse the judgment on such grounds." An application for a new trial for newly discovered evidence is regarded with suspicion. (14 Ency. of Pl. & Pr. 790 et seq.)

Where the issue upon a petition for a new trial on the grounds of newly discovered evidence is tried by the court, and there is evidence to support the finding of the court, the appellate court will not disturb the finding upon the weight of the evidence. (*Richardson v. Penny*, 14 Okla. 591, 78 Pac. 320.) Action of trial court on a motion for a new trial, on ground of newly discovered evidence, or insufficiency of evidence, will not be disturbed on appeal, unless there was abuse of discretionary power. (*Case v. Cramer* (Mont.), 85 Pac. 878; *In re Colbert's Estate*, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 981, 80 Pac. 248; *People v. De Masters*, 109 Cal. 607, 42 Pac. 236.)

Before a new trial for newly discovered evidence, there must be a clear showing that by reasonable diligence it could not have been procured before the trial. (*Cudahy Packing Co. v. Hayes* (Kan.), 85 Pac. 811; *In re Colbert's Estate*, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 781, 80 Pac. 248;

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Fleisheim Mer. Co. v. Gillespie, 14 Okla. 143, 77 Pac. 183; *Armstrong v. Aragon* (N. Mex.), 79 Pac. 291.)

Newly discovered evidence, which is merely cumulative on part of the case, is not ground for new trial. (*Shannon v. City of Tacoma*, 41 Wash. 220, 83 Pac. 186; *State v. Lackey*, 72 Kan. 95, 82 Pac. 527.)

Cumulative evidence is not sufficient. (*Patterson v. San Francisco etc. Ry. Co.*, 147 Cal. 178, 81 Pac. 531; *Wood v. Moulton*, 146 Cal. 317, 80 Pac. 92, and cases there cited.)

The last case cited lays down the additional proposition that evidence merely designed to contradict witnesses is also not sufficient.

“Motion for new trial on newly discovered evidence is not to be granted unless the evidence makes it clearly probable that it will produce a different result on the retrial.” (*In re Colbert's Estate*, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 981, 80 Pac. 248; *State v. Hayworth*, 26 Utah, 310, 73 Pac. 413.) We also cite the following Idaho cases on the above propositions: *People v. Biles*, 2 Idaho, 114, 6 Pac. 120; *State v. Hardy*, 4 Idaho, 478, 42 Pac. 507; *State v. Davis*, 6 Idaho, 159, 53 Pac. 678; *Knollin v. Jones*, 7 Idaho, 466, 63 Pac. 638.

SULLIVAN, J.—This suit was brought to recover a two-thirds interest in the South Fork, Nos. 2 and 3 mining claims, situate in Elk City mining district, Idaho county, and for an accounting by the respondent for the ore extracted from said claims. It was alleged and claimed by appellants that a prospecting partnership for the location of mining claims was entered into between appellants and the respondent, and that during the existence of that partnership said mining claims were located. The cause was tried by the court without a jury and judgment was entered against the appellants and in favor of the respondent. Motion for a new trial was made, and the grounds for such motion were insufficiency of the evidence to support the findings of the court and newly discovered evidence. Said motion was overruled, and the appeal

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is from the judgment and the order overruling the motion for a new trial.

Only two questions are presented on this appeal, and the first is the insufficiency of the evidence to support the findings of the court, and the second whether the court erred in overruling the motion for a new trial on the ground of newly discovered evidence. We have gone through the evidence very carefully and we find that there is a substantial conflict in it. That being true, the well-established rule applies that where there is a substantial conflict in the evidence, the appellate court will not reverse the judgment of the trial court. The affidavits of newly discovered evidence are mostly cumulative and corroborative, and we are unable to see that the court abused its discretion in denying a new trial on the ground of newly discovered evidence.

The judgment must, therefore, be affirmed, and it is so ordered. Costs are awarded to the respondent.

Stockslager, C. J., and Ailshie, J., concur.

(December 20, 1906.)

KOOTENAI COUNTY, Appellant, v. LOUIS T. DITTEMORE, Respondent.

[88 Pac. 232.]

COUNTY AS PLAINTIFF—RIGHT OF APPEAL—COUNTY COMMISSIONERS—
COLLATERALLY ATTACKED.

1. The provisions of section 1776, of the Revised Statutes, as amended by act of February 14, 1899 (Sess. Laws, p. 248), provide only for appeals taken by persons aggrieved or by taxpayers, and do not include the county itself in taking an appeal from an action or order of its own board of commissioners.

Argument for Respondent.

2. An order made by the board of commissioners allowing one of its own members compensation to which he is not entitled by law is void for want of jurisdiction, and may be collaterally attacked.

(Syllabus by the court.)

APPEAL from the District Court of the First Judicial District for Kootenai County. Hon. Ralph T. Morgan, Judge.

Action to recover illegal compensation allowed by the board of county commissioners to one of its own members. Demurrer to complaint sustained and judgment of dismissal entered. *Judgment reversed.*

Ezra R. Whitla, for Appellant.

In *McNutt v. Lemhi County* (Idaho), 84 Pac. 1054, this court laid down the very positive rule that "section 1776, Revised Statutes, as amended by act of February 14, 1899 (Laws 1899, p. 248), provided the right of appeal only for persons and taxpayers, and does not contemplate the county itself as a municipal corporation taking an appeal from an action or orders of its own board of commissioners."

In a case such as the one at bar, appeal is not the only remedy, but a direct action may be maintained by the county to recover back the money wrongfully paid. (*Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264; *Dunbar v. Board*, 5 Idaho, 407, 49 Pac. 409; *Ada County v. Gess*, 4 Idaho, 611, 43 Pac. 71.)

The orders of the board of county commissioners ordering warrants drawn to themselves in excess of the amount allowed by law were void, and made without jurisdiction, and therefore can be attacked collaterally and at any time. (*Dunbar v. Board*, 5 Idaho, 407, 49 Pac. 409; *Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264.)

Edwin McBee, for Respondent.

The first ground raised by the demurrer is that the court has no jurisdiction of the subject matter of the action, and

that appeal is the exclusive remedy. This contention is borne out by numerous decisions of the supreme court of this state. (*Morgan v. Kootenai Co.*, 4 Idaho, 418, 39 Pac. 1118; *Picotte v. Watt*, 3 Idaho, 447, 31 Pac. 805; *Rogers v. Hayes*, 3 Idaho, 597, 32 Pac. 259; *Johnson v. Savidge*, 11 Idaho, 204, 81 Pac. 616; *School Dist. v. Rice*, 11 Idaho, 99, 81 Pac. 155; *Ada Co. v. Bullen Bridge Co.*, 5 Idaho, 188, 95 Am. St. Rep. 180, 47 Pac. 818.)

It may be contended that the case of *Morgan v. Kootenai Co.* and other earlier cases holding the same doctrine have been reversed by the case of *Dunbar v. Board of County Commissioners*, 5 Idaho, 407, 49 Pac. 409, and *McNutt v. Lemhi Co.*, ante, p. 63, 84 Pac. 1054, but the case of *School Dist. v. Rice*, supra, is a recent case, and cites former cases holding to this doctrine with approval.

Boards of supervisors are a quasi judicial body so far as concerns the examination and settlement of accounts and claims against a county; and the allowance and settlement by such boards are an adjudication of the claims, and conclusive. (*El Dorado Co. v. Elstiner*, 18 Cal. 144; *Colusa Co. v. De Jarnett*, 55 Cal. 373; *Placer Co. v. Campbell* (Cal.), 11 Pac. 602; *McFarland v. McGowan*, 98 Cal. 329, 33 Pac. 113.)

SULLIVAN, J.—This action was brought by Kootenai county against the defendant Dittmore, to recover money alleged to have been unlawfully received by him for *per diem* and expenses as county commissioner for the term beginning January 9, 1899, and ending January 14, 1901. The defendant interposed a demurrer to the complaint on four grounds as follows: 1. That the court had no jurisdiction of the subject matter of the action; 2. That the complaint does not state facts sufficient to constitute a cause of action; 3. That there was another action pending between the same parties for the same cause; and 4. That the complaint is ambiguous, unintelligible and uncertain in that it does not allege any fact

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or facts showing that the said defendant received any sum or sums of money in excess of his legal *per diem* and expenses incurred by him as county commissioner in and for Kootenai county. Said demurrer was sustained by the court and judgment of dismissal entered. This appeal is from that judgment of dismissal.

While the record does not show upon what grounds the demurrer was sustained, we think it is conceded that it was sustained upon the ground that the court had no jurisdiction, as it is contended that the only remedy was by appeal from the order of the board of county commissioners allowing the claim of said defendant. Section 1776, Revised Statutes, as amended by act of February 14, 1899 (Sess. Laws, p. 248), provides that an appeal may be taken from any act, order or proceeding of the board of county commissioners by any person aggrieved thereby or by any taxpayer of the county, when any demand is allowed against the county, or when he deems any such act, order or proceeding illegal or prejudicial to the public interest.

Counsel for appellant rely upon *McNutt v. Lemhi County* ante, p. 63, 84 Pac. 1054. That case involved the payment of county warrants for the construction of a road, which warrants were in excess of any indebtedness that the commissioners could legally incur under the statute. This court held in that case that the provisions of section 1776 provide the right to appeal only for persons and taxpayers, and do not contemplate the county itself as a municipal corporation taking an appeal from the actions or orders of its own board of commissioners. This court held in *Fremont County v. Brandon*, 6 Idaho, 482, 50 Pac. 264, that an order allowing a county officer compensation to which he was not entitled by law, made by a board of county commissioners, was void for want of jurisdiction, and might be attacked collaterally. As bearing upon the question under consideration, see *Dunbar v. Board*, 5 Idaho, 407, 49 Pac. 409; *Ada County v. Gess*, 4 Idaho, 611, 43 Pac. 71. Upon the authority of those cases, the judgment

of the lower court must be reversed and the cause remanded. with instructions to overrule the demurrer and to permit the defendant to answer. Costs are awarded to the appellant.

Ailshie, J., concurs.

STOCKSLAGER, C. J., Dissenting.—I cannot concur in the conclusion reached by my associates in this case. On the former decisions of the court cited and discussed in the dissenting opinion in *McNutt v. Lemhi County*, ante, p. 63, 84 Pac. 1054, I think the judgment of the lower court should be affirmed. I am still unable to draw that fine distinction between “persons and taxpayers and the county itself” enunciated in this case as well as the McNutt case. The county commissioners are the guardians of the county, and their acts are entitled to full faith and credit until the contrary is shown. The county attorney or any citizen may appeal from any and all orders made and entered by the board. The county attorney is the legal adviser of the commissioners, and is presumed to look after the interests of the county at all times, and if he finds any illegal orders made by the board, it is his duty to appeal, which he may do as a citizen, person, or taxpayer.

(December 21, 1906.)

ANNA E. NELSON, Plaintiff, v. EDGAR C. STEELE,
Judge, Defendant.

[88 Pac. 95.]

WRIT OF MANDATE—RETURN THERETO—ISSUES MADE—JURY TRIAL—
DISCRETION OF COURT—CONSTITUTIONAL LAW—SPECIAL PROCEED-
INGS—CIVIL ACTION—COMMON LAW.

1. Under the provisions of section 4982, Revised Statutes, where issues of fact are made by a return to an alternative writ of mandate, neither of the parties to the proceeding is entitled to a trial of such issues by a jury as a matter of right, as that is left to the sound discretion of the court.

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2. The proceeding for a writ of mandate under the provisions of the statute of Idaho is a special proceeding of a civil nature, and is not a suit at common law or a civil action, and neither party to such proceeding is entitled as a matter of right to a trial by jury.

3. The seventh amendment to the constitution of the United States is not applicable to a proceeding to obtain a writ of mandate under the provisions of the statute of Idaho.

4. Special proceedings of a civil nature provided for in title 1, chapter 1, part 3, commencing with section 4955 of the Revised Statutes, are not civil actions such as are referred to in section 4020, Revised Statutes.

5. The proceeding in the case at bar is not a suit at common law nor a civil action under our code, but a special proceeding, and the trial of the questions of fact in such proceeding may, in the discretion of the court, be submitted to a jury.

(Syllabus by the court.)

This is an application in this court for a writ of mandate to compel the district judge to submit certain questions of fact arising on the return to an application for a writ of mandate to a jury. *Writ is denied and the case dismissed.*

Stewart S. Denning and William E. Lee, for Plaintiff.

I. N. Smith, for Defendant.

SULLIVAN, J.—This is an application for a writ of mandate to compel the judge of the district court of the second judicial district of this state to submit the issues of fact made by a petition for a writ of mandate and the return made there-to to a jury. It appears from the petition that the village of Kendrick is a municipal corporation, duly organized and existing under the laws of the state of Idaho, and that the plaintiff, Anna E. Nelson, was the duly appointed, qualified and acting treasurer of said village; that the village trustees claimed that she did not render an account to the trustees at the end of each month under oath showing the state of the treasury at the date of said account and the balance of money in the treasury as she was required to do by the provisions

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of section 64 of "An act to provide for the organization, government and powers of cities and villages," approved February 10, 1899, and because of such alleged failure the village trustees declared said office vacant and filled the vacancy by appointment; thereupon the said Anna E. Nelson refused to deliver over to such appointee the records, moneys, etc., belonging to said office. In that case, the answer to the petition put in issue several of the allegations of the petition, and especially the one alleging that the defendant had failed to render a monthly account of the condition of her office. When the matter came on for hearing she demanded a jury, and the judge refused to grant her one and heard the matter and granted the peremptory writ; thereupon she made application, in this proceeding, to the court for a writ of mandate, directed to the district judge to compel him to submit the questions of fact raised in that proceeding to a jury.

The only question submitted for our decision is whether, under the provisions of section 4982, Revised Statutes, she is entitled, as a matter of right, to a jury trial in that proceeding. Said section is as follows: "If an answer be made which raises a question as to a matter of fact essential to the determination of the motion and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury and postpone the argument until such trial can be had and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained in case they find for him."

Counsel for plaintiff cite, in support of the contention that plaintiff is entitled to a jury trial on the questions of fact in *mandamus* proceeding, *Chamberlain v. Warburton*, 1 Utah, 269, *State ex rel. McCalla v. Turnpike Co.*, 97 Ind. 416, and other decisions. The case in 1 Utah was decided in 1875,

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when Utah was a territory, and the court seemed to rest that decision upon the seventh amendment to the constitution of the United States, which provides that in suits at common law, where the value in controversy shall exceed \$20 the right of trial by jury shall be preserved, and held that that right could not be abridged by legislation or by the discretion of the court or judge. That proceeding was brought to compel the appellant to deliver over to him (the petitioner) the papers, books and records appertaining to the office of the clerk of the probate court of Tooele county, and claimed damages in the sum of \$500. The court there held that a trial by jury was a constitutional right. The Indiana case, *supra*, was an application for a writ of mandate to compel said turnpike company and the officers thereof to transfer certain stock on the books of said corporation to the plaintiff. The answer to the alternative writ put in issue certain facts which the court refused to submit to a jury for trial, and under the provisions of section 1171 of the statutes of Indiana the supreme court held that the plaintiff was entitled to a trial by jury. Said section is as follows: "Whenever a return shall be made in such writ, issues of law and fact may be joined; and like proceedings shall be had for a trial of issues and rendering judgment as in civil actions," and the court stated: "If, therefore, under our code, as in this case, an issue of fact is found upon matters contained in a return to an alternative writ of mandate, it stands for trial as an ordinary civil action in which a jury may be demanded by either party"; and held that the circuit court erred in overruling the relator's demand for a jury. That case is not in point, for the reason that the statute expressly provides that issues of fact in such cases must be tried to a jury when demanded.

The case of *Chumasero v. Potts*, 2 Mont. 242, decided in 1875, is a well-considered case, and was decided during the territorial days of Montana. It is there held that a proceeding in *mandamus* is not a case at common law or a civil action under the civil practice act of that state, and that a trial by jury in such proceedings is discretionary with the court; that

to call that proceeding an action or suit at law would be a misnomer. In *Dutton v. Village of Hanover*, 42 Ohio St. 215, which was an application against the village council of Hanover to compel that body to order an election as required by certain sections of the statute, it was held that the issue made by the answer was not of right triable by a jury. *Atner-ton v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 113, was an application for an alternative writ of mandate directed to Sherwood, commanding him to deliver to the relator the seal, books, records, papers and all other things whatsoever belonging to the office of the district court clerk of Mowers county, Minnesota, or show cause. The answer put in issue certain facts, and the court held that the provisions of the constitution, article 1, section 4, relating to trial by jury, were not intended to, and do not, include proceedings of this nature. Also, see *State v. Lake City*, 25 Minn. 404. In *Castle v. Lawler*, 47 Conn. 340, it was held that the trial of an issue of fact as to the truth of a return to an alternative writ of *mandamus* is not required by the constitution to be before a jury; and in *State v. Suwannee*, 21 Fla. 1, it is held that issues of fact in *mandamus* proceedings are triable by the court and not by a jury.

This proceeding is not a civil action under the provisions of our statute. It is a special proceeding of a civil nature. (See Rev. Stats., pt. 3, tit. 1, c. 1.) Said section 4982 provides that the court may in its discretion order questions in this kind of a proceeding, tried before a jury, thus leaving it to the sound discretion of the court whether the question of fact shall be tried by a jury or not. While in some of the early California cases it was held that questions of fact arising by the answer in proceedings in *mandamus* must be submitted to the jury if demanded, however, in *Howel v. Hogin, Treasurer, etc.* (Cal. App.), 84 Pac. 1002, the court held, under the provisions of section 1090 of the Code of Civil Procedure (which is identical with our section 4982), if the answer in the *mandamus* proceeding raises a question as to a matter of fact essential to the determination of a motion for a writ of mandate and affecting the substantial rights of a party, etc.,

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the court may, in its discretion, order the question to be tried before a jury, and that it was no abuse of discretion to refuse to order such disputed questions of fact to be tried before a jury. It will thus be seen that the supreme court of California now holds that questions of fact in this class of proceedings may or may not, in the sound discretion of the court, be submitted to a jury.

The term "special proceeding" is used in the codes of practice in many of the states in contradistinction to "action," and it was held in *Re Central Irr. Dist.*, 117 Cal. 382, 49 Pac. 354, that any proceeding in a court which was not under the common law or a suit in chancery is a special proceeding. "The term 'special proceeding,' within its proper definition, is a generic term for all civil remedies in courts of justice which are not ordinary actions. Where the law confers a right and authorizes a special application to a court to enforce it, the proceeding is special within the ordinary meaning of the term 'special proceeding.' (*Schuster v. Schuster*, 84 Minn. 403," 87 N. W. 1014.)

The case of *Gwinn v. Melvin*, 9 Idaho, 202, 108 Am. St. Rep. 119, 72 Pac. 961, involved the question of an application for administration on the estate of an intestate which was not made within four years from the date the applicant's right accrued, whether the statute of limitations, section 4060, Revised Statutes, barred such proceeding. In that case this court held that the provisions of said section 4060 applied to the proceeding involved in that action, and also held under the provisions of section 4080, which is as follows: "The word 'action,' as used in this title, is to be construed, wherever it is necessary so to do, as including a special proceeding of a civil nature," that that section of the Revised Statutes makes the statute of limitations applicable to certain special proceedings of a civil nature, but it was not intended to provide that all special proceedings of a civil nature were civil actions within the meaning of that term as used in section 4020 of the Revised Statutes. There is a clear distinction between the civil action referred to in said section 4020 and a special proceeding of a civil nature referred to in title 1, part 3, of the

Points Decided.

Revised Statutes. It was clearly the intent of the legislature, in the enactment of said section 4982, to leave the matter to the discretion of the court as to whether questions of fact raised on an application for a writ of mandate are to be tried to a jury, and that does not in any way infringe on the provisions of the seventh amendment to the constitution of the United States, to the effect that in suits at common law, where the value in controversy shall exceed \$20, the right to trial by jury shall be preserved.

The proceeding at bar is not a suit at common law nor a civil action under our code, but a special proceeding, and the trial of the questions of fact may, in the discretion of the court, be had before a court or before a jury. The peremptory writ is denied and the application dismissed, with costs in favor of the defendant.

Ailshie, J., concurs.

STOCKSLAGER, C. J., Dissenting.—I cannot concur in the conclusion reached by the majority of the court. I think, under the showing made by plaintiff, she was entitled to have the questions of fact submitted to a jury. The right to trial by jury in cases of this character is guaranteed by the constitution of the United States as well as the constitution of this state, and should never be denied any citizen when such trial is demanded.

(December 24, 1906.)

KOOTENAI COUNTY, Appellant, v. N. G. SISSON, Respondent.

[88 Pac. 233.]

APPEAL from the District Court in and for Kootenai County. Hon. Ralph T. Morgan, Judge.

From a judgment in favor of defendant plaintiff appealed.
Reversed.

Points Decided.

Ezra R. Whitla, Prosecuting Attorney of Kootenai County, for Appellant.

Edwin McBee and Earl Sanders, for Respondent.

SULLIVAN, J.—As this action is similar to that of *Kootenai County v. Dittemore*, ante, p. 758, 88 Pac. 232, decided at this term of the court, and was by agreement of counsel to follow the decision in that case, the judgment of the court below is reversed and the cause remanded. Costs of this appeal are awarded to appellant.

Ailshie, J., concurs.

Stockslager, C. J., dissents.

(December 31, 1906.)

THE POTLATCH LUMBER COMPANY, a Corporation,
Respondent, v. HENRY T. PETERSON et al., Ap-
pellants.

[88 Pac. 426.]

EMINENT DOMAIN—ALLEGATIONS OF COMPLAINT—CONSTITUTIONAL LAW—NAVIGABLE STREAMS—IMPROVEMENT OF—FLOATING LOGS AND TIMBER—PRODUCTS—CHARACTER OF NAVIGABILITY—RIGHT TO EXERCISE POWER OF EMINENT DOMAIN—GENERAL WELFARE—PUBLIC USE—OBLIGATION TO THE PUBLIC—RIGHT OF PUBLIC SUPERVISION—OBSTRUCTION OF RIVER PROHIBITED—STREAMS NAVIGABLE IN FACT—DEVELOPMENT OF MATERIAL RESOURCES—PROVISIONS OF CONSTITUTION SELF-EXECUTING—PROCEDURE PROVIDED BY STATUTE.

1. Held, that the complaint alleges a cause of action in a suit seeking to exercise the power of eminent domain over land for the improvement of a river for storing water for floating sawlogs and other timber products.

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Points Decided.

2. Under the provisions of section 14, article 1, of the constitution, the necessary use of lands for the complete development of the material resources of the state is declared to be a public use.

3. Under the provisions of subdivision 3, section 5210, Revised Statutes, the necessary use of lands for storage basins and the improvement of the floatability of such streams may be obtained by the exercise of the power of eminent domain, and the provisions of said subdivision apply to all streams not navigable in fact.

4. The phrase "streams not navigable," as used in said section 5210, Revised Statutes, means streams not navigable in fact.

5. The legislature cannot by legislative act impress the character of navigability on a stream that is not navigable, as a stream not navigable in fact cannot be made so by legislation.

6. The power of eminent domain is an incident of sovereignty inherent in the states of this Union by virtue of their sovereignty.

7. The provisions of section 14, article 1 of the constitution of Idaho, declare for what purposes the power of eminent domain may be exercised, and the legislature cannot prohibit the exercise of that power for any of the purposes therein specified.

8. The right to exercise the power of eminent domain under the constitution of this state is not made to depend upon the narrow and restricted meaning of the phrase "public use" as defined by courts of last resort of some of the states.

9. Under the provisions of said section of the constitution, the general welfare and benefit of the public is taken into consideration, and if the taking is necessary to the complete development of the material resources of the state, such taking is for a public use.

10. The term "public use," as used in said section 14, article 1, of the constitution, means public usefulness and productive of general benefit. That term is a flexible one, and necessarily has been of constant growth as new public uses have developed.

11. The power of eminent domain under our constitution and laws is given a degree of elasticity, thus making it capable of meeting new conditions and improvements of the ever-increasing necessities of society.

12. The person or corporation who exercises the power of eminent domain assumes certain obligations to the public, and the grant of that right carries with it the right of public supervision and reasonable control.

13. One who exercises the right of eminent domain in the improvement of non-navigable rivers in this state for the purpose of floating logs and timber products does not thereby secure the exclusive use and control of such streams, but such streams are open

Argument for Appellants.

to the use of anyone who may have occasion to use them for any purpose.

14. Under the provisions of section 835, Revised Statutes, the construction of any dam or boom on any creek or river in this state that will unreasonably delay or hinder the passage or floating of timber down the same is prohibited.

15. In the enactment of section 5210, the legislative intent was to make the provisions thereof applicable to all streams not navigable in fact.

16. Under the provisions of said section of the constitution the power of eminent domain may be exercised when necessary to the complete development of the material resources of the state, and the great lumbering interest of the state is one of the material resources of the state, and cannot be completely developed without the exercise of said power.

17. While said provisions of the constitution are not self-executing, or, in other words, do not furnish the procedure by which that power may be exercised, the procedure to subject lands to a public use has been provided by the legislature.

(Syllabus by the court.)

APPEAL from the District Court of Second Judicial District for Latah County. Hon. Edgar C. Steele, Judge.

An action to condemn twelve and sixty hundredths acres of land for use as a storage reservoir for logs and timber products and to improve the navigability of the Palouse river. Judgment for respondent. *Affirmed*.

Wm. M. Morgan, for Appellants.

The respondent has no greater rights than those provided by the statute under which it seeks to proceed. The provision of the constitution in question is not self-executing, and if it is broader and more general in its terms than is the statutory enactment, nothing can be drawn from it in aid of the statute. Whatever rights the respondent may have to appropriate the appellants' land must be found in the act of the legislature. (Lewis on Eminent Domain, sec. 237; Cooley's Constitutional Limitations, 4th ed., 657; *Long v. Billings*, 7 Wash.

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267, 34 Pac. 936; *In re Poughkeepsie Bridge Co.*, 108 N. Y. 483, 15 N. E. 601.)

Nothing is to be read into the statute for the benefit of the respondent which does not appear there. A statute granting to a corporation the power of eminent domain must be strictly construed. (Cooley's Constitutional Limitations, 4th ed., sec. 530; Lewis on Eminent Domain, sec. 254; *Ford Bridge Baptist Cem. Assn. v. Redd*, 33 W. Va. 262, 10 S. E. 405; *Gilmer v. Lime Point*, 19 Cal. 47; *In re Poughkeepsie Bridge Co.*, 108 N. Y. 483, 15 N. E. 601; *United States v. Rauhers*, 70 Fed. 748; *Currier v. Marietta etc. R. R. Co.*, 11 Ohio St. 228; *Miami Coal Co. v. Wigton*, 19 Ohio St. 560; *Clay v. Penoyer Creek Imp. Co.*, 34 Mich. 204.)

The taking of property for a strictly private purpose of this kind cannot be justified by merely calling it a public use. (Lewis on Eminent Domain, sec. 165; *Amador Queen M. Co. v. Dewitt*, 73 Cal. 482, 15 Pac. 74; *Con. Channel Co. v. Central Pac. R. Co.*, 51 Cal. 269; *Bridal Veil Lumbering Co. v. Johnson*, 30 Or. 205, 60 Am. St. Rep. 818, 46 Pac. 790, 34 L. R. A. 368; *Apex Trans. Co. v. Garbade*, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882, 62 L. R. A. 513; *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964, 74 Pac. 681, 63 L. R. A. 820; *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662, 77 Pac. 1046; *In re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429; *In re Split Rock Cable-Road Co.*, 128 N. Y. 408, 28 N. E. 506; *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114; *Sholl v. German Coal Co.*, 118 Ill. 427, 59 Am. St. Rep. 379, 10 N. E. 199; *Water Power Co. v. Berrien*, Circuit Judge, 133 Mich. 48, 103 Am. St. Rep. 438, 94 N. W. 379; *Cozard v. Kanawah Hardwood Co.*, 139 N. C. 283, 111 Am. St. Rep. 779, 51 S. E. 932, 1 L. R. A., N. S., 969; *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A., N. S., 842.)

From the authorities last above cited it will be seen that the true rule is that land cannot be taken under the exercise of the power of eminent domain unless, after it is taken, it will be devoted to the use of the public independent of the will of the corporation taking it.

Argument for Respondent.

John P. Gray and G. G. Pickett, for Respondent.

In adopting section 14, article 1, providing for the condemnation of land for public use, the framers of our constitution had in view the decisions of the older states upon the mill dam acts and the Nevada decisions extending the same rule to mines.

The supreme court of Massachusetts, in *Boston & Roxbury Mill Corp. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622, first announced the rule, stating that in regard to the manufacturing establishments, there was nothing in which the public had a more certain and direct interest. (*Hazen v. Essex County*, 12 Cush. 475; *Murdock v. Stickney*, 8 Cush. 111; *Turner v. Nye*, 154 Mass. 579, 28 N. E. 1048, 14 L. R. A. 487; *Scudder v. Trenton Del. Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444.)

The supreme court of the United States has reached the same conclusion. (*Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; *Otis Co. v. Ludlow Mfg. Co.*, 201 U. S. 140, 50 L. ed. 696, 26 Sup. Ct. Rep. 353.)

California, Nevada, Utah, Colorado, the Dakotas, Montana and Idaho have recognized that the taking of land for the purposes of irrigation, under the climatic conditions which exist in the arid states, is a taking for a public use, and that doctrine has received the support and approval of the supreme court of the United States. (*Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.) Even in the case where the taking is for the benefit of one individual user. (*Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676.)

The first case under the Nevada statute allowing the taking of private property under the eminent domain act for the purpose of mining, milling or smelting, or other reduction of ore in the state of Nevada, is the case of *Dayton Gold & Silver M. Co. v. Seawell*, 11 Nev. 394. (*Overman Silver M. Co. v. Cochran*, 15 Nev. 417; *Douglas v. Byrnes* (C. C.), 59 Fed. 29.)

The principle has been squarely accepted and adopted by

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the supreme court of the United States. (*Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676; *Stikley v. Highland Boy Gold M. Co.*, 200 U. S. 527, 51 L. ed. 581, 26 Sup. Ct. Rep. 301.)

The supreme court of Montana has recognized the doctrine in *Butte etc. Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 298, specifically approving *Dayton etc. Min. Co. v. Seawell*, 11 Nev. 394, *Overman etc. Min. Co. v. Cochran*, 15 Nev. 147, *Douglas v. Byrnes*, 59 Fed. 31, and *Hand Gold Min. Co. v. Parker*, 59 Ga. 419, (*Ellenghouse v. Taylor*, 19 Mont. 462, 48 Pac. 757.)

When the constitution of Idaho was framed, the convention undoubtedly had in its mind the decision of all of these states holding that the necessary use of lands for the development of the great natural resources was a public use, and it was with those decisions in mind that they incorporated the provisions of section 14, article 1 of the constitution.

Judge Hanford, in the United States circuit court for Washington, held that the Palouse river was a navigable stream but a month or two during the entire year. During the remainder of the year he held it a non-navigable and a private stream. The case in which this was held was not reported. (*Volts v. Metcalf Lumber Co.*)

If the stream is not navigable in fact, the mere legislative declaration that it is navigable cannot make it so. (*Murry v. Preston*, 106 Ky. 561, 50 S. W. 1095; *Duluth Lumber Co. v. St. Louis Boom Co.*, 17 Fed. 419; *Watkins v. Doris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199; *Jones v. Pettibone*, 2 Wis. 308; *Wisconsin River Imp. Co. v. Lyons*, 30 Wis. 61.)

SULLIVAN, J.—This action was commenced for the purpose of condemning twelve and sixty hundredths acres of land belonging to the appellants for use as a storage reservoir for logs, and which is overflowed by reason of the construction of a dam tending to improve the navigability of the Palouse river. The complaint alleges with particularity the necessity for the appropriation and the facts upon which

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respondent bases its right to condemn. The Palouse river is a small stream having its source in the state of Idaho, and flows westward into the state of Washington. At certain seasons of the year its banks are full of water and it becomes in its natural state a floatable stream for logs. Except during the freshets it is a small stream incapable of serving as a highway for logs, except by the use of splash dams and other artificial means. Along its headwaters are forests of pine and other timber, a large number of acres of which belong to respondent. The stream affords the only means of transporting the timber from the forests to the market. The respondent owns three mills upon said stream and employs a large number of men in connection therewith, which mills depend on their supply of sawlogs from such forests, and depend wholly upon said stream for floating said timber down to the mills. At the town of Potlatch, Idaho, respondent has constructed a large sawmill located a short distance down the stream from the land sought to be condemned, and has built a dam near said mill on said stream for the purpose of improving the navigation of said stream for logs and affording a storage reservoir for holding the logs for said mill.

The complaint alleges specifically the facts found by the court which are hereafter set forth. The appellants demurred to the complaint on the ground that it did not state a cause of action and relied upon two propositions of law in support of said demurrer: 1. That the taking of said land was not for a public use; and 2. That the statutes of Idaho were not sufficiently broad to cover such use. The demurrer was overruled by the court and appellants refused to further plead, and stood on their demurrer. Evidence in support of the allegations of the complaint was introduced, and the court made its findings of fact and conclusions of law and entered a decree in favor of the respondent. The court decreed that the defendants were entitled to receive from the plaintiffs \$500 as full compensation for the damages suffered by them for the taking of said land for said purposes. The facts found by the court necessary to the understanding of this case are as follows:

After finding that the plaintiff was a corporation duly organized, etc., and that the defendants were husband and wife and in possession of the land sought to be condemned, it found that a large area of land, aggregating hundreds of square miles in the northern portion of Latah county, Idaho, is heavily timbered with a growth of pine and other merchantable and valuable timber; that said territory is drained by the Palouse river and its tributaries and that said lands are adjacent to and lie along the Palouse river and its tributaries; that for many years the said timber area laid undeveloped; that no general business was carried on and no towns or settlements were located in said region; that said county derived practically no taxes from any property situate in said section; that the title to said land was very largely in the government of the United States; that during the past four or five years the plaintiff corporation has become the owner of large tracts of said timber land, and has invested and expended large sums of money in purchasing said timber and timber lands, and is commencing operations to develop the same; that it is the owner of three sawmills on said river, and that the mill at Potlatch in said county was in the course of construction, and employs, and will continue to employ, a large number of men; that said river is a stream used for floating and rafting purposes and the driving of logs and timber products; that it is capable of serving an important public use and utility, and has been declared to be a navigable stream by the legislature of Idaho; that it is navigable for logs only; that it is not navigable for boats of any character or description; that it rises in the state of Idaho and flows for a long distance through the territory described, which is heavily timbered with valuable merchantable timber, and flows into the state of Washington; that said sawmills of plaintiff are situated in what is known as the great Palouse farming country; that there is no merchantable saw timber throughout that farming country, and the forests along said river are the natural supply point from which the said farming country secures its timber and timber products, and the said saw-

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mills are furnishing and supplying a large part of the demand for lumber throughout said country, both to citizens of the state of Idaho and the state of Washington; that the only means of transportation of said timber from the forests to the mills at the present time is the said river; that said river is not a wide river, and is not of uniform size during all the seasons, but is subject to the rise and fall dependent on the rain and snow, and, during portions of the year, there is not sufficient water to float the logs in said stream except by the use of artificial means, it being necessary to store the water by the use of dams and splash or flood the logs down, by opening the dams; that it is impossible for plaintiff to transport during the high stages of water, sufficient logs to run its mills during the entire year, although it does take down at such times as many of said logs as is practicable under the circumstances; that during the periods of high water the convenient, economical and practical method of transporting the logs from the forests to the mills is by the use of said splash dams; that said dams cannot be constructed at any place. but necessarily must be built, constructed and maintained at points rendered favorable by the topography of the land on the sides of the river, which affords storage basins for logs, which are very few; that said timber lands owned by the plaintiff are located in that part of the state of Idaho where the working and developing of the timber industry constitutes the principal and main business and occupation of its inhabitants, and that plaintiff in cutting, removing and manufacturing the said timber owned by it, and in the construction of its mill at Potlatch, will employ in said state a large number of men, aggregating many hundreds; that along and adjacent to said river are few farms, and, excepting the lumber industry, the said farming industry constitutes the only industry in which men are engaged in that section of the country; that said farms are situated far from the open market, but the development of the lumber district has and will afford a market at home for the products of the said farms, and the development of the lumber industry is of great im-

portance and benefit to the said farmers residing in that section of the county; that the land upon which said timber now stands is covered with a fertile and productive soil, and upon the removal of the timber will become valuable agricultural land affording homes for thousands of people, and the removal of the timber will result in the development and building up of that section of the farming country described; that the plaintiff has constructed a dam for the purpose of storing the waters of the Palouse river and furnishing a storage basin for logs for the purpose of improving the floating capacity and navigability of said river; that said dam extends across said river; that by reason of the construction of said dam a portion of the land situate in the northeast quarter of the northwest quarter of section 7, township 41 north of range 4 west, Boise meridian, is overflowed by water being backed up by the said dam (then follows a complete description by metes and bounds of said land, containing a total area of twelve and sixty hundredths acres); that seven and seventy hundredths acres thereof is meadow land and four and ninety hundredths acres is brush land; that where said dam is constructed is one of the few places upon said river naturally fitted for the construction and maintenance of the same; that the use of said river by said dam and storage reservoir is the necessary means to a complete development of the material resources of this state, and the use of the said dam and storage reservoir will become and constitutes a public use within the provisions of section 14, article 1, of the constitution of Idaho and the acts of the legislature of the state of Idaho; that the timber of plaintiff cannot be successfully removed and manufactured by any other means than the use of said river except at an enormous, unreasonable and unprofitable expense; that in the manufacture of said timber into lumber at that place it is absolutely necessary that dams for improving the navigation of said stream and storage reservoirs for storing and holding said logs be used, and the necessary use is so great that the timber upon the said areas of land cannot be profitably worked without

the use thereof; that to construct said dam at the point where it is absolutely necessary in the profitable and reasonable use of the stream for the purposes of plaintiff, as aforesaid, it is necessary to overflow the said twelve and sixty hundredths acres of land; that said land is only a portion of a forty acre tract which defendants are in possession of at that point; that there exists a necessity for the appropriation by the said plaintiff of that part of the lands, in the possession of defendants to enable the plaintiff to carry on and conduct its business of lumbering and in developing the material resources of said county; that without such appropriation plaintiff cannot profitably, successfully and completely develop its said timber lands, whereas the use of the said lands will enable the plaintiff to profitably and reasonably develop its properties, and thereby develop the material resources of the state; that the denial of the right to use said lands would be disastrous upon the growth and prosperity of the state, and would tend to hinder and retard the development of the material resources of the state; that the plaintiff has been unable to secure the use of said land by agreement or otherwise with the said defendants, though plaintiff did heretofore and before the commencement of this action request and seek to procure from the said defendants said lands for the said storage basin for logs, which request was refused by the defendants and each of them; that plaintiff, when it made such request of the said defendants, offered them a reasonable compensation for the said land for any damages resulting from the grant of said land, and defendants refused to accept said offer for compensation; that the defendants purchased said land with the full knowledge that the plaintiff had already constructed a dam and overflowed said land, and that the plaintiff would need the same in the necessary use of the said river for the purpose of logging and would need the same for the storage of logs; that said land is not more valuable than thousands of acres of other land situated near and adjoining the same and in the vicinity thereof, and the court finds that the award made by the commissioners of \$500 is

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a just and fair award of all the damages suffered by defendants by reason of the taking of said land for the purposes mentioned; and as conclusions of law from the foregoing facts the court found that the plaintiff was entitled to a decree adjudging and awarding to him the use and easement of said twelve and sixty hundredths acres of land for the purpose of storing logs, floating logs and improving the navigation of said stream, and the right and privilege of overflowing said land. The proper decree was entered in accordance therewith. This appeal is from the judgment, and the only error assigned is the action of the court in overruling the demurrer to the complaint and entering judgment for plaintiff.

It is contended by appellant that the provisions of section 14, article 1 of the state constitution, and the statutes of the state in force in regard to the powers of eminent domain, are not sufficiently broad and comprehensive to authorize or permit the respondent, who is plaintiff here, to have condemned the lands in question for the uses and purposes stated in the complaint. Section 14, article 1 of the Idaho constitution, is as follows:

“Section 14. The necessary use of lands for the construction of reservoirs or storage basins, for the purposes of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes to convey water to the place of use, for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.

“Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor.”

Subdivision 3 of section 5210, Revised Statutes, as amended by the laws of 1903, page 204, is as follows:

“Section 5210. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: . . . Subd. 3. Wharves, docks, piers, chutes, booms, ferrier, bridges, toll roads, by-roads, plank and turnpike roads, steam, electric and horse railroads, reservoirs, canals, ditches, flumes, aqueducts and pipes, for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for storing and floating logs and lumber on streams not navigable.”

It is first contended that the complaint does not state a cause of action under said provisions of the constitution and the statute, in that it nowhere alleges that it is proposed to use the land sought to be taken for a reservoir with a view to public transportation. The allegation on that point is to the effect that said river is narrow and not of uniform size during all seasons of the year; is dependent on rain and snow and during portions of the year it does not carry sufficient water to float logs except by the use of artificial means; that it is necessary to store the water by the use of dams and splash or flood the logs down by opening the dams; that during the period of high water, the convenient, economical and practical method of transporting said logs from the forest to the mills is by the use of such dams; that such dams cannot be constructed at all places, but must be built at points rendered favorable by the topography of the land on the sides of the river which affords storage basins for logs; that said dam was constructed for the purpose of storing the waters of said river and furnishing a storage basin for logs for the purposes alleged, and for the purposes of improving the floating capacity and navigability of said river, particularly at the season of the year when said river was at the lowest stage. I think the allegations of the complaint are sufficient to show that the land sought to be taken will be used for the purpose of storing and floating logs and timber on said river and im-

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proving its navigability, and under said provisions of the constitution and of subdivision 3, section 5210, Revised Statutes, the right of eminent domain has been extended to land for storing as well as floating logs and timber, and is declared to be a public use.

It is contended that the right of eminent domain under the provisions of said section 5210 can only be exercised in the improvement of streams not navigable, and that as the territorial legislature had declared, by act approved February 14, 1879. that the Palouse river was a navigable stream, the right of eminent domain could not be exercised to improve the navigability of said stream. I cannot concur in that contention, as it is clear the provisions of said section 5210 are applicable to all streams not navigable in fact. It is alleged in the complaint and found as a fact by the court that the said stream is not even navigable for logs a part of the season, and I have no doubt that said section applies and was intended to apply to all such streams. Judge Hanford, in the United States circuit court for the state of Washington, in *Voltz & Metcalf v. Potlatch Lumber Co.*, held that said stream was not a navigable stream except during portions of the year, and that the evidence in that case clearly showed that during a portion of the year logs could be floated upon it; that the period during which they could be floated without the aid of artificial means was comparatively short, constituting only a month or two of the entire year; that during the remainder of the year said stream was not navigable. The decision in that case has not been published in the reports. The court holds that said stream is not navigable in fact, upon the evidence produced on the trial. It is clear to this court that the declaration of a state legislature cannot impress upon a stream a character of navigability for logs when the stream does not carry water sufficient to float a log. If a stream is not navigable in fact, the mere legislature declaration that it is navigable in fact cannot make it so. (*Murray v. Preston*, 106 Ky. 561, 90 Am. St. Rep. 232, 50 S. W. 1095; *Duluth Lumber Co. v. St. Louis Boom Co.*, 17 Fed. 419, 5 McCrary, 382.)

It is alleged in the complaint, and the court found in the case at bar, that said river was not navigable for commercial purposes in its natural state, and it is clear from the allegations of the complaint and findings of the court that it is not navigable for logs or timber products during a great portion of the year unless aided by artificial means and devices. The language used in paragraph 3 of said section 5210, as amended, refers not to streams capable of floating logs, but to streams which are navigable in fact; for it was certainly understood by the legislature that many of the streams of this state which would float logs during flood time did not carry sufficient water to float logs during the remainder of the season, and in order to make them so, the right of eminent domain would need to be exercised for the purpose of procuring land in order to improve the same for storing and floating logs and timber.

Then the question is fairly presented: Does the use of said dam and storage basin of twelve and sixty hundredths acres under the aforesaid facts constitute a public use within the provisions of said sections of our constitution and statutes? The conclusion by this court upon that question is of very great and lasting importance to the complete development of the material resources of our state.

In limine, we shall make a few observations upon the power of eminent domain. That power is an incident of sovereignty inherent in the federal government and the several states by virtue of their sovereignty. This power with all its incidents is vested in the legislatures of the several states. (1 Lewis on Eminent Domain, sec. 237; Cooley's Constitutional Limitations, 7th ed., 755; *Hollister v. State*, 9 Idaho, 8, 71 Pac. 541.)

The provisions in regard to the power of eminent domain and the taking of private property for a public use contained in said section 14, article 1 of our constitution, emanate directly from the people instead of from the legislature, and are therefore, legal and valid, emanating from the highest power. In meeting the marvelous industrial development of many of the United States in the last one hundred years, it

has been found impossible in many instances to follow or apply the letter of the common law in regard to the power of eminent domain. To follow it in the application of that power in many instances would greatly hamper, retard, and in many instances defeat, the development of the great natural advantages, resources and industrial opportunities of many of the states of the Union. And the framers of our constitution thoroughly understood those facts, and understood that a complete development of the material resources of our young state could not be made unless the power of eminent domain was made broader than it was in many of the constitutions of the several states of the Union. In Idaho, owing to the contour of the country, its mountain fastnesses and the great difficulty of preparing and constructing means and modes of communication and transportation, and also owing to the arid condition of the state, the necessity for irrigation in the development of the state's agricultural resources and in the development of its boundless mineral wealth, it was considered a necessity to the complete development of the material resources of the state to enlarge and broaden the power of eminent domain in the state; hence the adoption of said section 14, article 1 of our constitution. In many of the state constitutions the right to exercise the power of eminent domain is made to depend upon the question whether the use contemplated is or is not a public use in the most narrow and restricted meaning of the phrase "public use." The decisions under many state constitutions, therefore, are of little value as precedents for cases arising under constitutions like that of Idaho, Colorado and other western states, which make the character of the use, whether strictly public or otherwise, the criterion of the right to exercise the power. There are two well-marked and conflicting lines of decisions by the courts in dealing with the constitutional rights to exercise the power of eminent domain. One class of those decisions is represented by *Brown v. Gerald*, 100 Mo. 351, 109 Am. St. Rep. 526, 61 Atl. 785, 70 L. R. A. 472, which draws a sharp distinction between "public use" and "public benefit," and

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guards the private rights of property against the assertion of the power of eminent domain for public benefits as distinguished from public use. The other line of decisions is represented by *Nash v. Clark*, 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 571, 1 L. R. A., N. S., 208, which case was taken by error to the supreme court of the United States, 198 U. S. 860, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676. That was an action to condemn land for the enlargement of a private ditch, and the supreme court of the United States there held that the peculiar local conditions in the state of Utah justify the enactment of a statute under and by which an individual land owner may condemn as for a public use a right of way across his neighbor's land for the enlargement of a private irrigating ditch in order to obtain water to irrigate his land, which would otherwise remain valueless. The latter class of cases takes the view that the general welfare and benefit of the public should prevail over private property rights, even though the use for which the power of eminent domain is asserted is not in a strict sense a public use, and, as stated in the note to *State ex rel. Tacoma I. Co. v. White River P. Co.*, 31 Wash. 648, 82 Pac. 150, 2 L. R. A., N. S., 842: "The influence of peculiar local conditions and necessities in determining the choice between these two tendencies is plainly discernible." The case of *Talbot v. Hudson*, 16 Gray (82 Mass), 417, belongs to the latter class, and it was held in substance that in determining whether the use is public, it has never been held essential that the entire community, or that any considerable portion of it, should directly enjoy or participate in the benefits to be derived from the purpose for which the property is appropriated. That it is enough if the taking tends to enlarge the resources, increase the industrial energies and promote the productive power of any considerable part of the inhabitants of a section of the state, or leads to the growth of towns and the creation of new channels for the employment of private capital and labor, as such results indirectly contribute to the general prosperity of the whole community.

It is declared in said section of our constitution that the necessary use of lands to the complete development of the material resources of our state is a public use. And I think it clearly appears from the allegations of the complaint and the findings of the court that for the complete development of the vast lumber and timber interests of that section of the state along the Palouse river, the power of eminent domain may be exercised over said twelve and sixty hundredths acres of land. Our attention has not been called to any definition of the term "public use"—that is, a certain criterion to determine when the power of eminent domain may be exercised. In *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221, it was contended that the term "public use" should be distinguished from the term "public benefit," and that by "public use" was meant the possession, occupation and direct enjoyment by the public. In determining that question the court said: "It seems that such a limitation on the intention of this important clause would be entirely different from its accepted interpretation and would be as unfortunate as novel. One of the most important meanings of the word 'use' is defined by Webster as 'usefulness,' 'utility,' 'advantage,' 'productive of benefit.' 'Public use' may, therefore, well mean public usefulness, utility, advantage; or what is productive of general benefit; so that an appropriation of private property by the state under its right of eminent domain for purposes of great advantage to the community is a taking for public use. Such, it is believed, is the construction which has uniformly been put upon the language by the courts, legislatures and legal authorities." (See *Words and Phrases Judicially Defined*, p. 5828.) It is further stated in *Olmstead v. Camp*, *supra*: "It is a subject (public use) which does not admit the definition, as the defined limits of to-day might not answer for the changed condition of to-morrow. . . . The power (of eminent domain) acquires a degree of elasticity to be capable of meeting new conditions and improvements of the ever-increasing necessities of society." (See *Dayton Gold & Silver Min. Co. v. Seawell*, 11 Nev. 394.) At page

5829 of volume 6, Words and Phrases Judicially Defined, the author cites a number of decisions under the following propositions: "The term 'public use' is flexible, and cannot be confined to the public use mentioned at the time of forming the constitution. All improvements that may be made, if useful to the public, may be encouraged by the exercise of eminent domain. Any use of anything which will satisfy reasonable public demand for facilities for travel, for transmission of intelligence or of commodities, would be a public use." That term is a flexible one, and necessarily has been of constant growth as new public uses have developed. (Randolph on Eminent Domain, 35.) And it has been said that what is a public use under eminent domain statutes will depend somewhat upon the nature and wants of the community for the time being. (*Brown v. Gerald, supra.*)

There is no doubt when a person or corporation exercises the power of eminent domain, he or it assumes certain obligations to the public, and the grant of the right of eminent domain carries with it the right of public supervision and reasonable control. The improvement of said river is not for the use of the respondent alone, although under the conditions which exist it may be more benefited than others. But the river will be open to anyone who may have occasion to use it for floating logs and timber products. Under the provisions of section 835, Revised Statutes, the construction of any dam or boom on any creek or river in this state that will unreasonably delay or hinder the floating or passage of timber down the same, is prohibited. (*Powell v. Springston Lumber Co., ante*, p. 723, 88 Pac. 97.)

There are many streams in this state that will float logs or lumber during the flood time or spring freshets and will not do so during the time that such streams are at the ordinary stage or during low water. If it be true that all such streams are navigable under the provisions of said section 5210, and for that reason the right of eminent domain cannot be exercised with reference to such streams, the power therein given is a mere shadow, without any substance, and amounts to

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nothing. For unless the stream is floatable for logs, there can be no good purpose or reason for storing logs in it or along it. The legislature well knew that many of our streams were floatable for logs in places, and not in others; it had in view those streams in the enactment of section 5210, and it intended to and did grant the right to exercise the power of eminent domain in order to make such streams floatable at places where they were not floatable unless improved by dams or otherwise. Shall we hold that the legislature did the foolish thing of granting the power of eminent domain on streams not floatable for logs and timber, and hold that it has neglected to do so on streams that might with a little improvement be made of great service in the transportation of logs and timber? A reasonable construction should be given to that section of our statute and constitution, and not one which would make the law ineffectual for any purpose whatever. And if, under the provisions of said section 14, article 1 of the constitution, the power of eminent domain may be exercised when "necessary to the complete development of the material resources of the state," and the lumbering interest is one of the material resources of the state, and that resource cannot be completely developed without the exercise of the power of eminent domain, then that power may be lawfully exercised. The legislature cannot annul that provision of the constitution by legislative enactment. The timber interest of our state is one of the great material resources of the state, and it is stated in said section 14 of the constitution as follows: "The necessary use of lands . . . to the complete development of the material resources of the state . . . is hereby declared to be a public use." But it is contended by counsel that said provision is not self-executing. We may concede that contention. But the legislature has prescribed the procedure for subjecting land to a public use or for exercising the right of eminent domain. Thus by legislative enactment that provision of the constitution is made effective. The people in this constitution have declared that the necessary use of lands to the complete development of the material re-

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sources of the state is a "public use," and the legislature has provided the procedure to subject such lands to that use. The complaint states a cause of action, and the judgment of the trial court must be sustained. Costs are awarded to the respondent.

Ailshie, J., concurs in the conclusion.

STOCKSLAGER, C. J., Concurring.—I concur in the final conclusion reached but not in all that is said, especially clause 11 of the syllabus. I think the constitution means "the same in the spring that it does in the fall."

(January 2, 1907.)

W. B. RUSSELL, G. F. RUSSELL and J. J. PUGH, Copartners, Respondents, v. F. L. ALT and FRANK KELLOM. Copartners, Appellants.

[88 Pac. 416.]

REFERENCE—ACTION AT LAW CANNOT BE REFERRED—CONFINED TO EQUITY CASES ONLY, WHERE BY CONSENT.

1. A court has no power to arbitrarily send an ordinary action at law to a referee for trial against the objection of either party to the litigation, and this, whether the suit requires the examination of a long account or not.

2. Reference is confined to equity cases only; under the provisions of our constitution the right to trial by jury is never to be denied in law cases.

(Syllabus by the court.)

APPEAL from the District Court of the First Judicial District for Kootenai County. Hon. R. T. Morgan, Judge.

Action for damages on contract. Judgment for plaintiff, from which and an order denying motion for new trial, defendant appeals. *Reversed.*

Argument for Respondents.

Edwin McBee, for Appellants.

The supreme court of Idaho, interpreting section 7, article 1, has held that its provisions must be read in the light of the law existing at the time of the adoption of the constitution, and that they were not intended to extend the right of trial by jury, but simply to secure that right as it existed at the date of the adoption of the constitution. (*Christensen v. Hollingsworth*, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211.)

A statute of Minnesota, authorizing a compulsory reference in actions at law where the trial of an issue of fact requires the examination of a long account on either side, was declared to be unconstitutional, being repugnant to the provisions of the constitution of that state that the right to a trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy. (*St. Paul Ry. Co. v. Gardiner*, 19 Minn. 132, 18 Am. Rep. 334.)

Our statute, section 4415, Revised Statutes, was taken from the California statute and was enacted in 1864. Long prior to that time this state had a judicial interpretation from the supreme court of California, holding that a court has no power to send a case to a referee for trial, against the objection of the defendant, unless it is an action in equity. (*Smith v. Pollock*, 2 Cal. 921; *Russell v. Elliott*, 2 Cal. 246; *Cahoon v. Levy*, 5 Cal. 294; *Grim v. Norris*, 19 Cal. 140, 79 Am. Dec. 206.)

In states where a compulsory reference is allowed in the face of a constitutional provision like ours, such right is based on laws that were in force prior to the adoption of such constitutional provision, but even assuming that there is a conflict of authority, our statute authorizing the appointment of referee was adopted from California after the decision of the case of *Grim v. Norris* had been rendered, and in adopting it from that state, after such a decision, we also adopted the judicial interpretation given to it by the highest court of that state.

Chas. L. Heitman and T. H. Wilson, for Respondents.

The constitution does not affect in any way the meaning of section 4415, Revised Statutes. There was nothing prior to

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the adoption of our constitution to restrict said section in its application but the common law, nor can there be since, as it is admitted the constitution does not interfere.

The expression, "the right of trial by jury shall be secured to all," found in the California constitution, but not in the Idaho constitution, means much more than "the trial by jury shall remain inviolate." (*Grim v. Norris*, 19 Cal. 142, 79 Am. Dec. 206; *Smith v. Pollock*, 2 Cal. 92.)

"The courts of California have necessarily adopted a strict construction of the statute, being impelled thereto by a provision of the constitution of the state."

"When the statute was enacted providing for a compulsory reference of issues to referees to hear and determine, the courts of that state were under the necessity of either declaring the act unconstitutional, or of giving it a strict and narrow construction. The latter course was pursued, and the statute held applicable to equitable actions only." (*Huston v. Wadsworth*, 5 Colo. 213.)

The following are leading cases in which the decision is based upon our statute: *Tribou v. Stroubridge*, 7 Or. 156; *Huston v. Wadsworth*, 5 Colo. 213; *Board of Commrs. v. McKinley*, 8 Okla. 128, 56 Pac. 1046. To same effect see *Van Tress v. Territory*, 7 Okla. 353, 54 Pac. 501; *Story's Equity Jurisprudence*, 10th ed., secs. 442-445.

An action at law involving the examination of a long account may properly be referred against the objection of one of the parties. (*Edwardson v. Garnhart*, 56 Mo. 91; *Sargent v. Putnam*, 58 N. H. 182.)

It is claimed by the appellant that if this proceeding is authorized by the statute (compulsory reference), it impairs the right of trial by jury in civil cases in actions at law, and that the statute is void from being in conflict with the constitution of this state, which provides that, "in civil cases the right of trial by jury shall remain inviolate." This language of the constitution indicates that the right of trial by jury shall continue to all suitors in courts in all cases in which it was secured to them by the laws and practice of the courts

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at the time of the adoption of the constitution. (*Mead v. Walker*, 17 Wis. 189.)

Under the statute, cases like this have been referred and tried by a referee, without question as to authority of the court to order the reference, for a quarter of a century; and if there was doubt as to the constitutionality of this statute, it would, under the circumstances and the sanction of long usage, have to be solved in favor of the statute. (Cooley's Constitutional Limitations, 741; *Fletcher v. Peck*, 6 Cranch, 128, 3 L. ed. 175; *Bank of United States v. Halstead*, 10 Wheat. 53, 6 L. ed. 264; *Parsons v. Bedford*, 3 Pet. 433, 7 L. ed. 732.)

Compulsory references are granted, as a rule, in actions of contract where long accounts are involved. (24 Am. & Eng. Ency. of Law, p. 222, sec. 3; *Chambers v. Appelton*, 84 N. Y. 649; *Walsh v. Darragh*, 52 N. Y. 592; *Vilmar v. Schall*, 61 N. Y. 568.

STOCKSLAGER, C. J.—This appeal involves but one question. It seems that plaintiffs commenced their action in the district court of Kootenai county to recover from the defendants the sum of \$954.75, balance due on a certain alleged contract by which defendants agreed to furnish plaintiffs certain logs to be delivered either at the mouth of the St. Joe river or at the village of Harrison, on or before the first day of April, 1905.

After denying all the allegations of the complaint, excepting the contract to furnish the logs at the time and place specified in the complaint, and the copartnership of plaintiffs in the logging business as stated, as well as the copartnership of defendants in the same business as stated, the defendants further answering, and by cross-complaint aver that plaintiffs are indebted to defendants in the sum of \$401.06 on a balance of account for logs furnished and for driving logs for plaintiffs. This cross-complaint is denied by plaintiffs.

After the pleadings were thus framed the case was regularly called for trial. A jury was impaneled and sworn to

try the case. A witness was called and sworn and testified on behalf of plaintiffs. The court then adjourned for the day. At the coming in of the court the following morning the court, of its own motion, discharged the jury and appointed a referee to take testimony and report findings to the court. We are indebted to counsel for appellants for the statements in his brief. It is not contradicted by counsel for respondents and is borne out by the transcript. The question is: Had the court the right to appoint a referee on its own motion? Counsel for appellants objected to the appointment of a referee and insisted on his right to a trial by jury; the record shows that he continued his objections to the proceedings of the court from the time of the appointment of the referee to final judgment, and then appealed from the judgment and an order denying his motion for a new trial. He insists that under the provisions of article 1, section 7 of our constitution he was entitled to a jury trial. It says: "The right to a trial by jury shall remain inviolate. . . . A trial by jury may be waived in all criminal cases not amounting to a felony, by the consent of both parties expressed in open court, and in civil actions by the consent of the parties signified in such manner as may be prescribed by law." At the time of the adoption of our constitution we had the following statutory provision with reference to the appointment of a referee: "When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a referee in the following cases: 1. When the trial of an issue of fact requires the examination of a long account of either side, in which case the referee may be directed to hear and decide the whole issue or report upon any specific question of fact involved therein; 2. When the taking of an account is necessary for the information of the court before the judgment, or for carrying a judgment or order into effect; 3. When a question of fact other than upon the pleadings arises upon motion or otherwise in any stage of the action; 4. When it is necessary for the information of the court in a special proceeding." (Rev. Stats. 1887,

sec. 4415.) This section is borrowed from California and is identical with section 639, Code of Civil Procedure of that state. The first territorial legislature of Idaho held in Lewiston in December, 1863, and January and February, 1864, in chapter 6 at page 115, enacted the California law, and it was carried into the Revised Statutes of 1887; hence, has been the law since the earliest existence of the territory.

The first expression we find in the California reports bearing on the subject under discussion was in January, 1852. (*Smith v. Pollock*, 2 Cal. 92.) Mr. Justice Murray, speaking for the court, said: "The language of the constitution is explicit, and it is evident the framers of that instrument intended to give the benefit of the trial by jury in every cause." Also the same volume, page 245, in *Russell v. Elliott*. In *Cahoon v. Levy*, 5 Cal. 294, it is again held that in all cases at law the right to trial by jury can be insisted upon and enforced. We next find the same doctrine expressed in *Grim v. Norris*, 19 Cal. 140, 79 Am. Dec. 206. This decision was rendered in 1861. Mr. Justice Cope delivered the opinion. We quote from the opinion: "The ground of the reference was that a trial of the case should require the examination of a long account, and the court acted, no doubt, on the supposition that the statute afforded the requisite authority for the order. But the constitution provides that 'the right of trial by jury shall be secured to all, and remain inviolate forever,' and if such a construction of the statute could be maintained, we do not see why this right might not be entirely swept away by legislative enactment. The framers of the constitution regarded the right of the citizen in this respect as too sacred and valuable to be intrusted to the guardianship of the legislature, and the provision referred to was intended as a restriction upon legislative authority."

It will be seen that the court of last resort of California had repeatedly construed this section 639 at the time our territorial legislature enacted section 184 of chapter 6 in 1863-64 and section 4415 of the Revised Statutes of 1887; hence under the rule, when we adopted the section, the inter-

pretation given it by the highest court of that state would seem to apply in this case. The right to trial by jury is one of the most sacred rights enjoyed by our people, and it is dangerous to attempt to legislate that right into the hands of a referee. It may at times be tedious as well as expensive, but it was handed down to us by the framers of our federal constitution, and any attempt to legislate or by judicial interpretation take it from the people should not be encouraged by the courts. In one of the most instructive decisions to which our attention has been called, *St. Paul & Sioux City R. Co. v. Gardner*, 19 Minn. 132, 18 Am. Rep. 334, it is said in the syllabus: "General Statutes, chapter 66, section 228, in terms authorizes compulsory reference in actions at law when the trial of an issue of fact requires the examination of a long account on either side. In this respect it is repugnant to the constitution, article 1, section 4, which provides that the right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy."

In 79 Am. Dec. 207, the author discusses the subject under consideration, and has cited the authorities bearing on the question. Respondent in his brief has also cited authorities holding that under a statute and constitution similar to ours the court is authorized to appoint a referee on its own motion. After reviewing all the authorities cited, we are inclined to the opinion that the rule laid down in California, Minnesota and Nebraska, and a number of other states, comes nearer reaching the right of the litigant as guaranteed by the constitution of the United States than the line of authorities taking the opposite view. We are not unmindful of the fact that numerous cases are before the courts wherein a referee is almost a necessity, and as said by counsel for respondent in his brief, "From the great inconvenience that might arise by submitting long and complicated accounts to jurors who are not accountants and whose results at best would be unreliable, it seems to us that it would be manifestly unjust to compel a party to submit such complications to a jury, and dis-

astrous to this class of litigation.” There is much force and reason in this assertion, but the presumption is that in the class of litigation referred to it is the desire of all parties to the litigation to get at the facts; hence, when serious controversies or long complicated accounts are shown to exist. the attorneys are willing, or even anxious, to submit such questions to a referee, but to say that the court can peremptorily submit a law case to a referee over the objection of all parties to the litigation, and thereby deprive citizens of their constitutional right to trial by jury, is not in accord with our view of the constitutional right of the citizen. The case is reversed and remanded, with costs to appellants.

Ailshie, J., concurs.

SULLIVAN, J., Concurring.—I concur in the conclusion reached. The guaranty found in section 7, article 1 of the constitution of Idaho, to the effect that the right of trial by jury shall remain inviolate, was not intended to extend the right of trial by jury, but simply to secure that right as it existed at the date of the adoption of the constitution, and has no reference to suits in equity. (*Christensen v. Hollingsworth*, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211.) As bearing on the question of the right to trial by jury of questions of fact in certain proceedings, see *Nelson v. Steele, Judge*, ante, p. 762, 88 Pac. 95, decided at this term of our court.

Points Decided.

(January 2, 1907.)

**LATAH COUNTY, Appellant, v. MARTIN HASFURTHER
and JOSEPH HASFURTHER, Respondents.**

[88 Pac. 433.]

**PRIVATE OR BY-ROADS—NUMBER OF SIGNATURES TO PETITION—APPEAL
FROM ORDER OF BOARD OF COMMISSIONERS—APPEAL FROM THE DIS-
TRICT TO THE SUPREME COURT—VIEWERS MUST TAKE STATUTORY
OATH.**

1. Private or by roads may be opened for the convenience of one or more residents of any road district in the same manner as public roads, the person or persons for whose benefit the road is opened paying the damage awarded to land owners and keeping the road in repair. (Rev. Stats. 1887, sec. 933.)

2. One signature is sufficient to authorize the board of county commissioners to take the necessary steps to open a private or by-road under the provisions of section 933 of the Revised Statutes of 1887.

3. If the land owners are dissatisfied with the award for damages or with any of the proceedings of the board of county commissioners with reference to laying out and establishing a private or by-road, they may appeal to the district court, where the case will be heard *de novo*, or they may refuse to accept the award, and thus compel condemnation proceedings.

4. An appeal from the district court to the supreme court in cases of this character is under the provisions of section 4, page 273, Session Laws of 1899, under the title of "An act regulating appeals from the district court to the supreme court," etc.

5. Section 923 of the Revised Statutes of 1887, requiring the board of county commissioners to appoint three viewers, one of whom shall be a surveyor, does not make it the duty of the board to appoint the county surveyor, and when he is appointed one of the viewers, it is as essential that he take the statutory oath as either of the other viewers.

6. Where it is disclosed by the record that all of the viewers did not take the statutory oath, the proceeding is irregular and voidable, and should be reversed on appeal to the district court.

(Syllabus by the court.)

APPEAL from the District Court of Second Judicial District for Latah County. Hon. Edgar C. Steele, Judge.

Argument for Respondents.

Respondents moved to reverse or modify order of the board of county commissioners. The motion was sustained and the order reversed, from which order and judgment the county appeals. *Judgment affirmed.*

W. E. Stillinger and Forney & Moore, for Appellant.

This court has held that a private road may be laid out upon the application of a particular individual; that only one signer is necessary to the road petition. (*Latah County v. Peterson*, 3 Idaho, 398, 29 Pac. 1089; *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577.)

An appeal would not lie on behalf of Martin Hasfurther from the action of the board of county commissioners awarding damages to the said Hasfurther, and the district court did not have jurisdiction to render its decision herein. (*Canyon County v. Toole*, 9 Idaho, 561, 75 Pac. 609.)

The Hasfurthers having appeared in person and with counsel before the board of county commissioners and contested the laying out of said road, introducing witnesses, thereby waived all objections to the jurisdiction of said board, and waived all irregularities which appeared in laying out and establishing said road prior to the date of said hearing.

If these parties were dissatisfied with the award of damages made by the board of county commissioners, the only course left to pursue was to wait until the amount awarded by the said board was tendered and reject the same, thereby compelling the county commissioners to commence condemnation proceedings as required by statute.

S. S. Denning, for Respondents.

It was the intention of the legislature that the matter on appeal from the board should be tried *de novo* in the district court, and this court has inferentially at least given countenance to the theory. (*Great Northern Ry. Co. v. Kootenai Co.*, 10 Idaho, 379, 28 Pac. 1078; *Canyen Co. v. Toole*, 9 Idaho, 561, 75 Pac. 609.)

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When the county surveyor is appointed one of the viewers under section 923, Revised Statutes, he is not appointed as a county officer, but simply as a citizen, the same as the other viewers, only that he possesses the technical education of a surveyor, and the viewing of roads is not one of the duties of a county surveyor, made so by virtue of his office, because there is nothing to compel him to serve as a viewer, and the statute provides (section 924): "They, the viewers, must be sworn to discharge their duties faithfully." The surveyor, while acting as a viewer, ought himself to have been sworn. The right to appropriate private property to public use lies dormant in the state until legislative action is had, pointing out the occasions, the modes, the conditions and agencies for its appropriation. These provisions must be regarded as in the nature of conditions precedent, which are not only to be observed and complied with before the right of the property owner is disturbed, but the party claiming authority under the adverse proceedings must show affirmatively such compliance. (Cooley's Constitutional Limitations, 6th ed., p. 648.)

As the statute stood in California, they changed it by apt legislation, so that one petitioner could petition for the road, but the state of Idaho in adopting their code refused to do so.

This court has no jurisdiction of this matter, because the same was not appealed within five days after the decision of the court. (Sess. Laws 1899, p. 249, amending sec. 1779.)

STOCKSLAGER, C. J.—This is an appeal from the judgment of the district court of Latah county. In October, 1905, Joseph Kambitch presented to the board of county commissioners of Latah county his petition for a private road. The petition was signed by himself alone. The petition says: "The necessity for and advantage of the establishing of said road are as follows: That your petitioner, Joseph Kambitch, owns two hundred and forty acres in section 2 in said township, and resides there, with his family, long prior hereto;

that he has now no public road for ingress and egress or public road facilities whatever, and that the opening of the proposed private road will enable him to reach a public highway in the most convenient manner, and in a manner best calculated to do the least damage to the owners of the land over which the proposed road will run in the event of the petition being granted; that the residents of said road district are either relations or friends of the parties over whose premises said proposed road will run, and your petitioner cannot get ten signers in said road district if that number is required by the county commissioners; that the petitioner further desires to have an outlet to a public road, so that he can attend elections, perform jury duty, road duty, militia duty, give evidence in court, and carry produce of his land to market."

A bond was filed and viewers appointed, who reported to the county commissioners, recommending that the road be granted as prayed for. A hearing was had and an order made by the county commissioners approving the report of the viewers and awarding damages. The order is as follows: "In the matter of the petition of Joseph Kambitch for a private road in road district No. 4, it is ordered that viewers' report therein be approved and damages are hereby awarded as follows: To J. N. Hasfurther, the sum of \$250.00. To Martin Hasfurther, the sum of \$300.00." The Hasfurthers appealed from the order of the commissioners granting the said Joseph Kambitch the road through their respective premises as prayed for in his petition and awarding them the sum set out in the order. The appeal is from the order and the whole thereof.

In the district court the prosecuting attorney for Latah county moved to dismiss the appeal: "1. That an appeal will not lie at this time, as the order of the board of county commissioners does not in any manner affect the property or the rights of either Martin Hasfurther or J. N. Hasfurther. in that the said order appealed from does not create or establish a public highway; 2. That the said order appealed from

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by said appellants is an order awarding damages to said appellants, and that the said above-entitled court has not jurisdiction to hear and determine on an appeal from the board of county commissioners the amount of damages to be awarded to nonconsenting land owners in the establishment of public highways; 3. That the said appellants, and each of them, as shown by the said order of the board of county commissioners appealed from, did appear at the time and place fixed by the said board for the hearing of said petition, and contest the laying out of said road, and the amount of damages to be awarded, and thereby waived any and all objections to the jurisdiction of the said board in said case, and any and all irregularities which may have appeared in the laying out and establishment of said road prior to the date of the said hearing; 4. That no order of the said board has been appealed from by the said appellants which in any manner questions the regularity of the proceedings had in said road case or the jurisdiction of the board of county commissioners." It is not shown by the record what disposition was made of this motion, but from orders and proceedings of the court we infer it was overruled. We next find a motion to reverse and set aside the order of the commissioners which affirms the report of the viewers granting said road for the reasons: "1. That no map of the said road has ever been added to the report of, made or presented to, or filed with or by the board of county commissioners; 2. That the petition upon its face shows that there is only one petitioner signing the petition; 3. That the records in the case show that one of the viewers was never sworn." On the twentieth day of June, 1906, the court ordered judgment reversing the order of the commissioners in affirming the report of the viewers and granting the road.

Counsel for appellant assign six errors: First, the order of the court in reversing and annulling the action of the board of county commissioners; second, in holding that more than one signature is necessary for a petition for a private road; third, in holding that the order appealed from granted or

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established a public highway; fourth, that the order appealed from was an order awarding damages to said Martin Hasfurther and J. N. Hasfurther, and that no appeal will lie from the action of the board of county commissioners awarding damages, and the court erred in taking jurisdiction of the same; fifth, the said Martin Hasfurther and J. N. Hasfurther appeared before the board of county commissioners, and contested the merits of said road and the amount of damages to be awarded, and thereby waived all objections to the jurisdiction of the said board on account of the irregularities which may have appeared in the laying out and establishment of said road prior to the date of said hearing, and the district court erred in reversing the order of the board of county commissioners; sixth, that no order of the board of county commissioners was appealed from by the said Martin Hasfurther and J. N. Hasfurther, which in any manner questioned the regularity of the proceedings had in said road case or the jurisdiction of the board of county commissioners.

Some questions raised in this appeal are new in this state, hence we have felt justified in giving a complete history of each step taken from the time the petition was filed down to the final order of the district court. The petition was not filed under the provisions of section 920 of the Revised Statutes, which provide that any ten inhabitants of a road district, taxable therein, may petition for the alteration or to discontinue any road or to lay out a new road. It would seem that the petition must have been filed under the provisions of section 933 of the Revised Statutes of 1887, which provide: "Private or by-roads may be opened for the convenience of one or more residents of any road district in the same manner as public roads are opened, whenever the board of commissioners may for like cause order the same to be viewed and opened, the person for whose benefit the same is required paying the damage awarded to land owners, and keeping the same in repair." It should not be difficult for a court to construe the above sections as we view them. By the terms of

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section 920, ten inhabitants of a road district taxable therein for road purposes may, by petition and a proper showing, have any road altered or discontinued, or they may in like manner have a new road laid out. By section 933 any resident of a road district may have a private road established for his own use and benefit, but it does not become a public highway in the sense that it must be kept in repair at the expense of the public; anyone may use it, but it must be kept in repair at the expense of the resident or residents for whose use it has been established; that damages awarded to land owners must also be paid by the party or parties for whose benefit the road has been established. The reason as well as the necessity for the two sections above quoted is apparent. If ten or more inhabitants of any community think it necessary to establish a new highway and so say by petition to the board of county commissioners, it is the duty of the county commissioners to take the necessary steps to establish the road, provided there are at least ten petitioners residents of the road district and *taxable therein for road purposes*. This section is evidently based on the theory that if there are ten residents of the road district who are taxable for road purposes, their annual labor or road tax will be sufficient to keep the road in repair. It was never the intention of the legislature that any citizen of the state should be deprived of the use of a highway, and hence section 933, *supra*, was enacted providing that he might "have an outlet to a public road so that he can attend elections, perform jury duty, road duty, militia duty, give court evidence, and carry produce of his land to market," provided he is willing to pay all damages to land owners through whose land the road runs, and keeps it in repair. This is a right guaranteed him by the constitution of our state also. (See art. 1, sec. 14.) The writer has had a recent experience that convinced him that it would have been better if there had been whole communities in certain portions of our state fenced in; at any rate, it was made plain that the residents of that section were not prohibited from exercising one of the privi-

leges urged as a reason for petitioner's road—that is, the right to attend elections. From the foregoing suggestions (with the exception of the last one) it will be seen that we are of the opinion that private roads may be established in this state on the petition of the one party who is the beneficiary of such road. Construing article 1, section 14 of our constitution, in *Latah County v. Peterson*, 3 Idaho, 402. 29 Pac. 1089, Mr. Justice Morgan said: "The necessity for such private roads is apparent where it is stated that it would be impossible to improve many valuable tracts of land in this state which are not reached by public highways unless this power existed. Such roads are, therefore, necessary to the complete development of the material resources of the state." We are in accord with the contention of counsel for appellant, that the names of ten signers to the petition who are resident taxpayers for road purposes in the road district where it is sought to establish a road under the provisions of section 933 of the Revised Statutes, are not necessary. If such were the requirements of our statute, it would in many instances destroy the very purpose for which section 933 was enacted. It was to meet just such emergencies as has arisen in the case at bar. (See *Sherman v. Buick & Cornick*, 32 Cal. 242, 91 Am. Dec. 577.)

We next come to what we consider the most important question to be considered in this appeal. Counsel for appellant say: "It is further submitted that the said Martin Hasfurther and Joseph Hasfurther having appeared in person and with counsel before the board of county commissioners and contested the laying out of said road, introducing witnesses, thereby waiving any and all objections to the jurisdiction of said board, and waived any and all irregularities which appeared in laying out and establishing said road prior to the date of said hearing. It is further submitted that at no time during any of the proceedings in said road case was any objection made to the board of county commissioners by Martin Hasfurther, Joseph Hasfurther or their attorney, Stewart S. Denning, as to any irregularity

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in any of the proceedings had in said road case, but, on the contrary, Martin Hasfurther and Joseph Hasfurther each appeared in person and by attorney, Stewart S. Denning, before the board of county commissioners on the date set for the hearing of said road case and contested only the amount of damages awarded by the viewers." It is urged by counsel for appellant that the only course left for respondents was to wait until the amount awarded by the said board was tendered and reject the same, thereby compelling the county commissioners to commence condemnation proceedings as required by statute. Further they say: "That in fairness to the board of county commissioners and in justice to the taxpayers of the county, a question of irregularity should not be raised for the first time on appeal."

Counsel for respondents insists that they had a right to appeal from the order of the board granting the road through their premises and the award for damages, and that when the case came to a hearing in the district court, they were entitled to a trial *de novo*. In support of this contention he cites Session Laws of 1899, pages 248, 249. The language of the law referred to is as follows: "Upon the appeal, the matter must be heard anew, and the act, order or proceeding so appealed from may be affirmed, reversed or modified." We are disposed to accept his theory as correct. The Hasfurthers had either of the remedies they saw fit to pursue—that is, by appeal from the order of the county commissioners or refuse to accept the award and thus compel condemnation proceedings by the county. They chose the former remedy, hence must accept the law with reference to appeals. Counsel for respondents also urges that the appeal to this court should be dismissed for the reason that it was not taken within five days after the decision of the trial court, and cites Session Laws of 1899, page 249. At a later date of the same session (1899), at page 273, the title of the act is "Regulating Appeals from the District Court to the Supreme Court." Section 4 of the act provides as follows: "From a judgment rendered as an appeal from an order, de-

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cision or action of the board of county commissioners within ninety days after the entry of judgment." This court recently construed the two sections above referred to in *Foresman v. Board of County Commissioners of Nez Perce County*, 11 Idaho, 11, 80 Pac. 1131, in which it was held that an appeal of the character under consideration was governed by the latter section of the 1899 Session Laws; hence there were ninety days instead of five days in which to perfect the appeal.

We are in accord with counsel for respondents in his contention that when the case was appealed to the district court from the order of the board of county commissioners appointing viewers and fixing the award for damages to each of the appellants there, respondents here, that the case was there for review of all the acts, orders and proceedings had in that tribunal. In *Canyon Co. v. Toole*, 9 Idaho, 561, 75 Pac. 609, we think this question is settled; also *Great Northern Ry. Co. v. Kootenai County*, 10 Idaho, 379, 78 Pac. 1078. It is shown by the record in this case that J. W. Kirkwood was the county surveyor of Latah county, and that A. S. Lyon, R. S. Mathews and J. W. Kirkwood were by the board of commissioners appointed the viewers to view and survey the road; that after such appointment R. S. Mathews and A. S. Lyon took the road viewers' oath, which was administered to them by J. W. Kirkwood as county surveyor. It nowhere appears in the record that Mr. Kirkwood ever took the road viewers' oath prescribed by the statute before entering upon the discharge of his duties. Section 923 of the Revised Statutes of 1887 provides: "Upon filing such petition and bond the board of county commissioners must appoint three viewers, one of whom must be a surveyor, to view and survey any proposed alterations of an old or opening of a new road, to be made in accordance with the description in the petition, and submit to the board an estimate of the cost of the change, alteration or opening including the purchase of the right of way and their views of the necessity thereof." Section 924 provides: "The road viewers must be disinterested citizens of the

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county, but not petitioners; they must be sworn to discharge their duties faithfully; . . .” It will be seen by section 923 that one of the viewers must be a surveyor, but not necessarily the county surveyor, neither does the statute prescribing the duties of the county surveyor make it his duty to survey private roads. Section 924 requires that the viewers shall be sworn to “discharge their duties faithfully,” and the failure of one of the viewers to take the oath prescribed is not a compliance with the statute. If the statute required that the county surveyor should be one of the viewers in all cases of laying out, altering and establishing roads in his county, it is possible that his official oath would be sufficient, but in our view it was as essential for him to take the oath as it was for either of the others, and his failure to do so nullifies the entire proceedings of the county commissioners. The judgment is affirmed, with costs to the respondents.

Ailshie, J., concurs.

Sullivan, J., concurs in the conclusion.

INDEX.

ACCOMPLICES.

1. Under the provisions of section 7871, Revised Statutes, an accomplice must be corroborated on some material fact or circumstance which tends to connect the defendant with the commission of the offense, independent of the evidence of the accomplice. (State v. Bond, 424.)

2. Where it is shown that the court erroneously instructed the jury that they "should act upon the evidence of an accomplice with great care and caution, and subject it to careful examination in the light of all the evidence in the case, and the jury ought not to convict upon such testimony alone, unless after a careful examination of such testimony they are satisfied, beyond all reasonable doubt, of its truth," is not sufficient ground for a reversal of the judgment where it is shown the court had twice given the statutory instruction that the accomplice must be corroborated, and it is shown that the accomplice has been corroborated. (State v. Bond, 424.)

ACTIONS.

1. Under the provisions of section 4169, Revised Statutes, a plaintiff may join in the same action all injuries to property arising out of the same contract. (Frepons v. Grostein, 671.)

2. By the provisions of section 1, article 5 of the constitution of Idaho, the distinction between actions at law and suits in equity and the forms of all such actions and suits are prohibited, and there is but one form of action in this state for the enforcement or protection of private rights or the redress of private wrongs. (Coleman v. Jagers, 125.)

3. While by the provisions of section 1, article 5 of the state constitution the distinctions between actions at law and suits in equity and the forms of such actions and suits are prohibited, that does not abolish the rules of law and equity. (Dewey v. Schreiber Implement Co., 280.)

AGENCY.

See Brokers.

ALIMONY.

See Divorce.

(809)

ANIMALS.*Sheep Infected with Disease.*

1. In a civil action for damages, under section 21 (Sess. Laws 1901, p. 151), *scienter* need not be alleged or proven where carelessness or negligence is averred. (North & Douglas v. Woodland, 50.)
2. In declaring the acts mentioned in the above section punishable by fine, imprisonment, or both, the legislature was exercising the police powers of the state, and in such case the complaint need not allege that the defendant knew the act complained of was unlawful. (North & Douglas v. Woodland, 50.)
3. Under the provisions of sections 21 (*supra*), 23, and 6886 of the Revised Statutes, a complaint that alleges that the injury complained of was the result of the careless and negligent acts of defendant is sufficient. (North & Douglas v. Woodland, 50.)
4. An act approved February 6, 1905 (Sess. Laws 1905, p. 39), is an act for the suppression of contagious and infectious diseases among livestock, and repeals certain provisions of an act entitled, "An act to suppress contagious and infectious diseases of sheep, etc.," approved March 7, 1901 (Sess. Laws 1901, p. 142), and continues in force certain provisions of said act relative to the authority and duties of the state sheep inspector and his deputies, and imposes those duties on the state veterinary surgeon and those under him. (Noble v. Bragaw, 265.)

Trespassing Livestock.

5. An action may be maintained under section 1210 of the Revised Statutes for the trespass of sheep within two miles of plaintiff's dwelling-house, where the plaintiff is the absolute owner in fee simple of the lands upon which his dwelling-house is situated. (Risse v. Collins, 689.)
6. Under the provisions of section 20, article 5, of the state constitution, the district courts have concurrent original jurisdiction with justice courts in actions prosecuted under sections 1210 and 1211 of the Revised Statutes for the unlawful herding and grazing of sheep. (Risse v. Collins, 689.)
7. In actions prosecuted under sections 1210 and 1211 of the Revised Statutes, damages sustained by reason of the herding and grazing sheep upon the public unappropriated lands within two miles of plaintiff's dwelling-house are measured by an entirely different standard and made up of different elements, and rest on a different theory from damages sustained by reason of such livestock herding and grazing upon the plaintiff's own lands. (Risse v. Collins, 689.)
8. Where the action is for damages sustained by reason of the herding and grazing of sheep upon the plaintiff's lands, and for

ANIMALS (Continued).

the consequent injury and damage to his growing crops, the measure of damages is the value of the crops at the time of their destruction. (*Risse v. Collins*, 689.)

9. Where the measure of damages for the destruction of growing grass is its value at the time and place it was destroyed, such value must be arrived at by the jury from evidence of such facts and circumstances as will disclose the uses for which such crop would have been most profitable, the nearest period at which it would have been marketable, and whether or not any further labor, expenses or service would have been necessary to bring it to the marketable condition and period. (*Risse v. Collins*, 689.)

10. Under the laws of this state, livestock, with certain exceptions, may run at large and roam and graze over and upon any of the uninclosed lands of the state, and the same will not amount to an actionable trespass against the owner of such livestock. (*Swanson v. Groat*, 148.)

11. One who willfully, deliberately and knowingly drives his livestock upon the lands of another, whether inclosed or uninclosed, and holds, herds and grazes them upon such lands over the protests and objections of the owner, is liable in damages for the trespass. (*Swanson v. Groat*, 148.)

APPEAL AND ERROR.***Time of Appeal.***

1. Where an appeal is taken from an order denying a motion for a new trial at a period of more than sixty days after the order is made and entered, such appeal is ineffectual and will be dismissed on motion of the adverse party. (*Trull v. Modern Woodmen of America*, 318.)

2. Where the appeal from the judgment was not taken within sixty days after the rendition of the judgment, and no valid appeal has been taken from the order denying a motion for a new trial, the appellate court is without authority or jurisdiction to examine the evidence for the purpose of ascertaining whether or not it is sufficient to support the verdict and judgment. (*Trull v. Modern Woodmen of America*, 318.)

3. When the transcript on appeal has not been filed with the clerk of this court within the time provided by the rules, and it does not appear that an extension of time has been granted, a motion to dismiss the appeal will be sustained. (*California Consolidated Mining Co. v. Manley*, 221.)

Bond and Undertaking.

4. Where there is a motion to dismiss an appeal on the ground of defects in the undertaking, the motion should specify the par-

APPEAL AND ERROR (Continued).

ticular defect complained of; but in case it does not, and is presented and argued by the respective counsel as though it were sufficient, the question of sufficiency of the specification cannot be raised for the first time in this court. (Matter of Paige, 410.)

5. An application to amend an undertaking on appeal must be made before the motion to dismiss the appeal has been granted. (Matter of Paige, 410.)

6. Where two appeals are taken and only one undertaking on appeal given, without reciting to which appeal it applies, the same is void for uncertainty, and such appeals will be dismissed on motion. (Thum v. Bailey, 510.)

7. Under the provisions of section 4809, Revised Statutes, and the surety company law, the undertaking on appeal must be executed on the part of the appellant to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof, not exceeding \$300. (Jackson v. Barrett, 465.)

8. If, in such undertaking, the sureties fail to obligate themselves to the effect that the appellant will pay all damages and costs which may be awarded against him on a dismissal of the appeal, the undertaking is insufficient and may be amended on seasonable application. (Jackson v. Barrett, 465.)

Bill of Exceptions.

9. The instructions given on the trial can only be reviewed in this court when they are saved by bill of exceptions, they being no part of the judgment-roll. (Crowley v. Croesus Gold etc. Mining Co., 530.)

10. Affidavits purporting to show errors committed in impaneling the jury are no part of the judgment-roll, and can only be reviewed when saved by bill of exceptions. (Crowley v. Croesus Gold etc. Min. Co., 530.)

11. The certificate of the clerk of the district court that certain affidavits were used on the application for a new trial, and that they were all the affidavits used, is not sufficient to authorize this court to consider such affidavits. Such certificate must be made by the trial judge or in an authenticated record certified by the judge showing what papers were used on such application for new trial. (Crowley v. Croesus Gold etc. Min. Co., 530.)

12. A certificate by the trial judge that "I have this day settled the within statement in the manner marked by me in pencil, allowing the proposed amendments where so marked and disallowing them where so marked," is not sufficient to authorize this court to consider the statement on appeal, as it is not known that such certificate

Review of Evidence.

21. Evidence in this case examined and considered and held sufficient to support the findings and judgment. (*Turmes v. Kisner*, 147.)

22. *Held*, in this case that there is not a substantial conflict in the evidence such as to bring it within the rule that where there is a substantial conflict in the evidence, the findings of the court will not be disturbed. (*Wood v. Broderson*, 190.)

23. Where a verdict is not in excess of the demand of plaintiff's complaint, and no error appearing in the admission of the evidence or instructions of the court, and there is any evidence tending to prove the amount of damages, this court will not examine the evidence to ascertain whether the verdict is excessive or not where the defendant fails or refuses to submit evidence. (*North & Douglas v. Woodland*, 50.)

24. Where there is a substantial conflict in the evidence, the findings of the trial court will not be disturbed. (*Heckman v. Espey*, 755.)

Dismissal of Appeal.

25. A motion to dismiss an appeal will be sustained when it is shown that counsel for appellant has been served with such notice and fails to appear and resist such motion, unless it appears to the court that appellant is not guilty of laches. (*National Bank of the Republic v. Agnew*, 189.)

26. Where a motion to dismiss an appeal is confessed and the court dismisses the appeal without prejudice to another appeal, the second appeal may be perfected at any time after the order of dismissal is made, regardless of whether the *remittitur* has been filed in the trial court or not. (*Jackson v. Barrett*, 465.)

Reversal of Cause.

27. Where there are disputed facts submitted to a jury their verdict will not be disturbed by this court, unless it is apparent from the record that their verdict is unwarranted by the evidence. *Held*, the evidence sufficient in this case to support the verdict. (*State v. Bond*, 424.)

28. An objection that the complaint does not state a cause of action first made in this court will not warrant the court in granting a new trial where it is shown that the complaint, even though inartistically drawn, states that the injury complained of resulted from the careless and negligent construction and operation of appellant's machinery and appliances used in appellant's mine, and further calls attention to the particular portion of such appliances that were defective. (*Crowley v. Croesus Gold etc. Min. Co.*, 530.)

29. Where a moving party designates certain specified grounds in his motion, and the trial court grants the motion without specifying any ground upon which the same was granted, the appellate court will assume, as a matter of course, that the motion was granted upon some ground named therein, and if the order cannot be sustained on any ground named in the motion, it will be reversed. (*Powell v. Springston Lumber Co.*, 723.)

See *Certiorari*; *Counties*, 9, 10; *Justice's Courts*; *New Trial*.

ASSOCIATIONS.

Unincorporated Associations and Joint Stock Companies to Purchase Land.

1. Under the provisions of sections 2 and 16, article 11, of the constitution of Idaho, an unincorporated association or joint stock company may be formed by individuals for the purchase of a single tract of real estate, the title to which may be taken in a trustee, and the articles of agreement of the association may provide that the death of a shareholder shall not result in the dissolution of the association, and may so limit the liability of the association and may provide that either or any of the officers or shareholders shall not sell or dispose of any of the property of the association without the concurrence of the shareholders. (*Spotswood v. Morris*, 360.)

2. Said association does not have or exercise any of the powers or privileges of corporations not possessed by individuals or partnerships. (*Spotswood v. Morris*, 360.)

3. To legally possess or exercise powers or privileges of corporations requires a sovereign grant. (*Spotswood v. Morris*, 360.)

4. Under the common law, joint stock companies are legal, and are not prohibited by the constitution and statutes of this state, provided they do not have or exercise any of the powers or privileges of corporations not possessed by individuals or partnerships. (*Spotswood v. Morris*, 360.)

5. As the constitution of Idaho and the statutes of the state do not prohibit the organization of joint stock associations having transferable stock, and which do not usurp the functions of a corporation nor exercise any of the powers or privileges of corporations not possessed by individuals or partnerships, the common-law rule as to their legality prevails in this state. (*Spotswood v. Morris*, 360.)

6. In the organization of said association there is the absence of the *electus personae*, which characterizes ordinary partnerships from corporations; and the death of one of its members or the sale of

ASSOCIATIONS (Continued).

the interest of one of the shareholders does not dissolve it. (*Spotswood v. Morris*, 360.)

7. The limitation of the agency of the members of the association is an incident of such associations, under the common law, resulting from the lack of the right of *delectus personae*, and not an incident of the corporation not possessed by a partnership. (*Spotswood v. Morris*, 360.)

8. Such an association is a partnership, but not a general partnership wherein one of the partners has plenary power to sell and otherwise dispose of the property of the association or create indebtedness beyond that provided for in the articles of association. (*Spotswood v. Morris*, 360.)

9. While some of the principles of partnership may apply to such associations, they cannot, from the very nature of the organization thereof, be entirely controlled by the legal rules and principles that control ordinary partnership. (*Spotswood v. Morris*, 360.)

10. *Held*, under said articles of incorporation, the vice-president or secretary have no authority to list the association's real estate with respondents for sale. (*Spotswood v. Morris*, 360.)

11. *Held*, that the respondents failed to show that the shareholders of said association ever authorized the vice-president or secretary to list said real estate for sale with the respondents or ratified the same. (*Spotswood v. Morris*, 360.)

12. *Held*, under the evidence, that respondents did not procure a purchaser for said land. (*Spotswood v. Morris*, 360.)

Limited Partnership—Service of Summons.

13. Where an action is begun upon the theory that the defendants compose a voluntary unincorporated joint stock company, and that the service of summons must be made upon each and every of the defendants to give the court jurisdiction, when the clerk of the court, through inadvertence or otherwise, enters judgment against the reserved defendants, on appeal such judgment will be set aside. (*Spotswood v. Dernham*, 400.)

14. In such case, where the partners served with summons appeal, that appeal inures to the benefit of the unserved partners, provided the service of summons on one partner is sufficient service on all of them. (*Spotswood v. Dernham*, 400.)

ATTORNEYS.

See District Attorney; Witnesses, 8.

BAIL.

The right of admission to bail after conviction of a felony does not necessarily follow the right to have a certificate of probable cause issue. (*In re Neil*, 749.)

BILL OF EXCEPTIONS.

See Appeal and Error, 9-12.

BILLS AND NOTES.

Where K. was at all times mentioned the agent and manager of a foreign insurance company which was doing business in this state without having first complied with the requirements of section 10 of article 11 of the constitution, and section 2653 of the Revised Statutes, as amended by act of March 10, 1903, and a solicitor for such company took H.'s promissory note in payment of a premium on a policy of life insurance, and thereafter assigned such note to K., on which K. advanced him the amount of his commission, and the solicitor thereupon agreed to repay K. in case H., the maker of the note, failed to pay the same: *Held*, that K. was not an innocent purchaser of the note for value. (*Katz v. Herrick*, 1.)

BOARD OF EQUALIZATION.

See Officers.

BOOMS.

See Waters and Watercourses, 7-11.

BROKERS.

1. Where the court fails to find on all the material issues made by the pleadings, the judgment will be reversed unless a finding upon such issues would not affect the judgment entered. (*Wood v. Broderson*, 190.)

2. The issues made by the pleadings held sufficient to require a finding upon the rate of commission to be paid. (*Wood v. Broderson*, 190.)

3. Where a party employs a real estate broker to sell a piece of real property at a stipulated price, and the broker procures a purchaser, who purchases the property at that price, the broker is entitled to his commission therefor. (*Wood v. Broderson*, 190.)

CATTLE.

See Animals.

CERTIORARI.

1. Under the provisions of section 4962 of the Revised Statutes, a writ of review will be issued upon proper application when an inferior tribunal, board or officer, exercising judicial functions, has
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CERTIORARI (Continued).

exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy. (*Dahlstrom v. Portland Mining Co.*, 87.)

2. Under the provisions of said section two things must appear before a writ of review will be issued: 1. That such tribunal, board or officer has exceeded its jurisdiction; and 2. That there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy. (*Dahlstrom v. Portland Mining Co.*, 87.)

3. Under the provisions of section 9, article 5 of the constitution, the supreme court is empowered to review, upon appeal, any decision of the district court or the judges thereof. Some orders, however, are only reviewable on an appeal from the judgment or order granting or denying a new trial. (*Dahlstrom v. Portland Mining Co.*, 87.)

4. The order of the court sought to be reviewed was made after judgment, and plaintiffs had an appeal therefrom. (*Dahlstrom v. Portland Mining Co.*, 87.)

5. Under the provisions of section 4880 of the Revised Statutes, an "order" is defined to be every direction of a court or judge made or entered in writing and not included in a judgment. (*Dahlstrom v. Portland Mining Co.*, 87.)

6. When it appears that the plaintiff has an appeal that is adequate from an order, a writ of review on motion will be quashed. (*Dahlstrom v. Portland Mining Co.*, 87.)

CHANGE OF VENUE.

See Venue.

CHATTEL MORTGAGE.

1. Where a chattel mortgage was given on a stock of merchandise, and the mortgagor thereafter went into bankruptcy, and the mortgagee proceeded to foreclose his mortgage, and suit was thereafter brought against the mortgagee and sheriff to recover the value of the property seized and sold in such foreclosure proceedings, and it was stipulated by respective counsel that the question as to the value of the property so seized and sold should be submitted to a jury, and that in case the court found the mortgage was void as against the plaintiff, judgment should be entered in his favor and against the defendants for the full amount of the value of the property as found by the jury, otherwise, judgment to be entered

CHATTEL MORTGAGE (Continued).

for the defendants, and the jury found the value of the property to be \$2,400; and the court found that the mortgage was valid, judgment should have been entered for the defendants. (Ryan v. Rogers, 404.)

CLERK OF COURT.

1. The clerk of the district court, *ex-officio* auditor and recorder, under the provisions of section 7, article 18 of the constitution, and the law carrying that section into effect, must pay quarterly, to the county treasurer, all fees which may come into his hands, from whatever source, over and above his actual and necessary expenses. This includes all fees for services rendered by virtue of said offices. (Rhea v. Board of County Commissioners, 455.)

2. Under the provisions of section 2294 of the Revised Statutes of the United States as amended by act of March 11, 1902, (32 U. S. Stats. at Large, 64), the clerk of the district court who takes homestead or other land proofs must do so in his official capacity and all fees collected by him for such service, whether for "preparing the deposition" or administering the oath and affixing the jurat, are provided for by the statute, and are collected by him in his official capacity and by virtue of his office, and must be accounted for and paid over to the county. (Rhea v. Board of County Commissioners, 455.)

COMMUNITY PROPERTY.

See Husband and Wife.

CONSTITUTIONAL LAW.***Construction of Constitution.***

1. Where the constitution or statute prohibits an act or declares that it shall be unlawful to perform it, it is the fair and reasonable interpretation and construction thereof to say that the people in the one case and the legislature in the other have intended to interpose their power and authority to prevent the act, and as one of the means of its prevention intended that the courts should not lend their power and authority in its enforcement. (Katz v. Herrick, 1.)

Division of Counties and Apportionment of Members of Legislature.

2. The legislature undertook to create the counties of Lewis and Clark out of Kootenai county, including in said Lewis and Clark counties the entire area included in Kootenai county, and thereafter passed an apportionment bill which was approved on the seventh day of March, 1905, whereby the said counties of Lewis

CONSTITUTIONAL LAW (Continued).

and Clark were each given one senator and two representatives, and each of the other counties of the state one senator and from one to five representatives. Thereafter the said act creating Lewis and Clark counties was held unconstitutional and void. *Held*, that as the legislative intent was to give each county one senator and representatives according to the number of votes cast at the last preceding election, Kootenai county was entitled to one senator and four representatives. (*Heitman v. Gooding*, 581.)

3. Said act of apportionment held valid and constitutional, except wherein it awarded two senators to Lewis and Clark counties. (*Heitman v. Gooding*, 581.)

CONTAGIOUS DISEASES.

See Animals.

CONTRACTS.

Where several writings constitute one contract, such writings must be construed together. (*Hunt v. Capital State Bank*, 588.)

CORPORATIONS.

1. Under the provisions of section 10, article 11 of the constitution, and section 2653 of the Revised Statutes as amended by act of March 10, 1903, it is made unlawful for any foreign corporation to transact business in this state without having first filed a copy of its articles of incorporation with the Secretary of State and the county recorder of the county in which its principal place of business is established, and having also in like manner filed written appointment designating and authorizing an agent within the state to receive and accept service of process in any and all matters in which the corporation may be a party or concerned. (*Katz v. Herrick*, 1.)

2. A foreign corporation failing to comply with the requirements of the constitution and of section 2653 of the Revised Statutes, as amended by act of March 10, 1903, cannot maintain a suit or action in any of the courts of this state for breach or violation of any contract entered into during the time the corporation had so failed and neglected to comply with the constitution and statute. (*Katz v. Herrick*, 1.)

3. The people in adopting section 10, article 11 of the constitution have clearly announced the public policy of this state toward foreign corporations, and have proclaimed in unmistakable language that such artificial beings, existing only in contemplation of law, must subject themselves to the jurisdiction and laws of this state

COUNTIES (Continued).

2. A county as a municipal corporation cannot ratify an act done in direct violation of the constitution, and in such case the doctrine of ratification cannot be invoked. (*McNutt v. Lemhi Co.*, 63.)

3. An order made by the board of commissioners allowing one of its own members compensation to which he is not entitled by law is void for want of jurisdiction, and may be collaterally attacked. (*Kootenai Co. v. Dittmore*, 758.)

Indebtedness and Warrants.

4. Under the provisions of section 3, article 8 of the constitution, no indebtedness or liability can be lawfully incurred by a county for any given year in excess of the income and revenue of such county for the same year without the assent of two-thirds of the qualified electors of the county voting in favor of incurring such indebtedness or liability at an election held for that purpose, unless such indebtedness or liability is incurred for an ordinary and necessary expense as authorized by the general laws. (*McNutt v. Lemhi Co.*, 63.)

5. Where county warrants were issued in the sum of \$6,350 for the construction of a wagon road and the question of incurring such indebtedness was not submitted to a vote of the people, and the whole thereof was in excess of the income and revenue of the county for the year in which such indebtedness was incurred, and no provision was made for the payment thereof, such indebtedness is in violation and contravention of the provisions of section 3, article 8 of the constitution, and is therefore void. (*McNutt v. Lemhi Co.*, 63.)

6. The necessity for county warrants to be issued in conformity with the requirements of section 2006 of the Revised Statutes which provides that "All warrants must distinctly specify the liability for which they are drawn and when it accrued," considered. (*McNutt v. Lemhi Co.*, 63.)

7. Under the act of March 10, 1903 (Sess. Laws, 1903, p. 204), providing for the annexation of a portion of Shoshone county to Nez Perce county, as construed in *Shoshone County v. Thompson*, 11 Idaho, 130, 81 Pac. 73, and *Shoshone County v. Proffit*, 11 Idaho, 763, 84 Pac. 812, warrants drawn by Nez Perce county in favor of Shoshone county for the proportionate part of indebtedness to be borne by the detached territory are payable out of a special fund to be raised from taxation, and the cash received by Nez Perce county from Shoshone county from money on hand at the time of annexation is not available for the payment of such warrants. (*Shoshone County v. Schuldt*, 507.)

8. The cash received from money in the treasury at the time of annexation was available for the payment of current expenses and

COUNTIES (Continued).

intended to compensate Nez Perce county for its outlay in maintaining county government in the annexed territory during the time for which it could not levy and collect taxes from that territory. (*Shoshone County v. Schuldt*, 567.)

Right of Appeal.

9. The provisions of section 1776, of the Revised Statutes, as amended by act of February 14, 1899 (Sess. Laws, p. 248), provide only for appeals taken by persons aggrieved or by taxpayers, and do not include the county itself in taking an appeal from an action or order of its own board of commissioners. (*Kootenai County v. Dittmore*, 758.)

10. Section 1776 of the Revised Statutes, as amended by act of February 14, 1899, provides the right of appeal only for persons and taxpayers, and does not contemplate the county itself as a municipal corporation taking an appeal from the action or order of its own board of commissioners. (*McNutt v. Lemhi Co.*, 63.)

See Constitutional Law, 2, 3.

COURTS.***District Court.***

1. Under the provisions of our constitution and statute, the district court has equitable jurisdiction, and is authorized to exercise it in all cases where the remedy at law is not adequate, complete and certain so as to meet all the requirements of justice in the case. (*Coleman v. Jagers*, 125.)

2. By the provisions of section 20, article 5 of the constitution, the district court is given original jurisdiction in all cases both at law, and in equity, as well as certain appellate jurisdiction. (*Coleman v. Jagers*, 125.)

Probate Courts.

3. Under the organic act of the territory of Idaho from its passage to December 13, 1870, the probate courts of the territory of Idaho had no jurisdiction to hear and determine civil cases, but had original jurisdiction in all matters of probate, settlement of estates of deceased persons and appointment of guardians. On the thirteenth day of December, 1870, Congress passed an act giving to the probate courts of Idaho territory, in addition to their probate jurisdiction, jurisdiction to hear and determine all civil cases wherein the debt or damage claimed did not exceed the sum of \$500, exclusive of interest, and jurisdiction in criminal cases arising under the laws of the territory that did not require the

COURTS (Continued).

intervention of a grand jury. (*Dewey v. Schreiber Implement Co.*, 280.)

4. Under the provisions of section 21 of article 5 of the state constitution probate courts are given original jurisdiction in all matters of probate, settlement of estates of deceased persons and appointment of guardians, and also jurisdiction to hear and determine all civil cases wherein the debt or damage claimed does not exceed the sum of \$500 exclusive of interest, and concurrent jurisdiction with justices of the peace in criminal cases. (*Dewey v. Schreiber Implement Co.*, 280.)

5. The civil cases referred to in said section are such cases as are required to be settled in actions at law, and do not include suits in equity for the foreclosure of liens or mortgages on real estate. (*Dewey v. Schreiber Implement Co.*, 280.)

6. Probate courts are courts of record only in matters of probate, settlement of estates of deceased persons and the appointment of guardians, and are not courts of record in proceedings in civil and criminal actions. (*Dewey v. Schreiber Implement Co.*, 280.)

7. The legislative act approved February 27, 1903 (Sess. Laws, p. 94), amending the ninth subdivision of section 3841, Revised Statutes, wherein it extends the jurisdiction of the probate court to try and determine actions to enforce mechanics' and laborers' liens and mortgages and other liens upon real property, *held*, unconstitutional and void. (*Dewey v. Schreiber Implement Co.*, 280.)

8. Under said provisions of the constitution and law, the probate judge must account for and turn into the county treasury all fees received by him for services rendered by virtue of his office, over and above his actual and necessary expenses. (*Rhea v. Board of County Commrs.*, 455.)

9. The salary paid to such officers, under the law, is in full compensation for all services rendered by them. (*Rhea v. Board of County Commrs.*, 455.)

10. Any gratuity received by a probate judge over and above the statutory fee of five dollars for solemnizing a marriage may, under section 2438, Revised Statutes, be retained by him for his individual use and benefit. (*Rhea v. Board of County Commrs.*, 455.)

Administration of Justice.

11. Under the provisions of section 18, article 1 of the constitution of Idaho, as well as by the unwritten dictates of natural justice, the courts of this state are commanded to administer justice without prejudice. (*Day v. Day*, 556.)

12. Neither the constitution of California nor Montana commands the courts to administer justice without "prejudice" as does the constitution of Idaho. (*Day v. Day*, 556.)

COURTS (Continued).

13. Public confidence in our judicial system and courts of justice demands that causes be tried by unprejudiced and unbiased judges. (Day v. Day, 556.)

See Justice's Court.

CRIMINAL LAW.***Presence of Accused at Trial—View Scene of Crime.***

1. While section 7782, Revised Statutes, which provides that: "If the indictment is for a felony, the defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of the defendant," is mandatory; a brief, temporary and voluntary absence of the defendant from the courtroom during the argument by counsel and ruling by the court on a motion to have the jury view the place where the offense was committed is not such a violation of the statute and invasion of such a substantial right of the accused as will cause a reversal of a judgment of conviction which is otherwise regular. (State v. McGinnis, 336.)

2. In a case where the court orders the jury to view the place where it is alleged that the offense was committed, it is error for the court to deny the defendant the right to be present at such inspection if he requests in person or by counsel the privilege of being present. (State v. McGinnis, 336.)

3. As to whether or not a defendant may waive the right of being present at a view of the place by the jury, *quaere*. State v. Reed, 3 Idaho, 754, 35 Pac. 706, criticised and soundness of rule questioned. (State v. McGinnis, 336.)

Joint Information—Separate Verdicts.

4. Where two defendants are jointly informed against and tried together for grand larceny, and the jury, under the instructions of the court, bring in a separate verdict against each, finding them guilty as charged in the information, and entitle each of the verdicts as though there were but a single defendant in the case, but name each of the defendants in the title. *Held*, that such verdicts are not void for uncertainty, and the fact that said verdicts were so entitled could not and did not prejudice the defendants. (State v. Cotterel, 572.)

5. Where the jurisdiction of the court is attacked on the ground that the term of court at which certain defendants were sentenced had elapsed before the sentence was pronounced by reason of the fact that the term in an adjoining county (under the settings of the terms by the judge) was to begin on the day that the court adjourned its term, and the record fails to show whether such term in the latter county had been adjourned prior to the adjournment of

CRIMINAL LAW (Continued).

the term in the county where the defendants were convicted, the presumption will be that the court acted legally in the matter and had jurisdiction to pronounce and enter judgment. (*State v. Cotterel*, 572.)

Appeal—Certificate of Probable Cause.

6. Paragraph 3 of rule 27 of the rules of the supreme court requires that one who applies to a justice of the supreme court for a certificate of probable cause under section 8048, Revised Statutes, shall have first made application to the district judge who tried the case, or show good reason why he has failed to do so, and shall give five days' notice to the county attorney or attorney general of his intention to make such application. (*In re Neil*, 749.)

7. The phrase "probable cause for the appeal," used in section 8048, Revised Statutes, does not mean that there is probable reason to suppose the judgment will be reversed, but rather means that the appellant has assigned or specified grounds on which he expects to rely that are open to doubt or honest difference of opinion, and over which rational, reasonable and honest discussion may arise—that the appeal must present some debatable question and is not merely frivolous and vexatious. (*In re Neil*, 749.)

8. The right of appeal by a defendant in a criminal case is absolute, and in no respect dependent on his guilt or innocence, and where he is availing himself of this remedy with any degree of good faith and not as a pretext for delay, it would be manifestly unjust to inflict upon him the punishment while he is having the validity of the judgment judicially determined. (*In re Neil*, 749.)

See Accomplices; District Attorney; Preliminary Examination.

CUSTODY OF CHILD.

See Habeas Corpus; Parent and Child.

DAMAGES.

1. When a complaint states fully and concisely the nature of the damage, amount, and that it was caused by the unlawful, wrongful and negligent acts of the defendant, *held*, that it states a cause of action. (*Hill v. Standard Mining Co.*, 223.)

2. Where the court instructs a jury, in a damage case, that the plaintiff cannot recover because of the obstruction of light or air, the presumption is that the jury observed the instruction. (*Frepsons v. Grostein*, 671.)

3. *Held*, that the record does not show that the jury were influenced by prejudice or passion in arriving at their verdict. (*Frepsons v. Grostein*, 671.)

DAMAGES (Continued).

4. *Held*, that the evidence is sufficient to sustain the verdict of the jury. (*Frepons v. Grostein*, 671.)

5. Where the plaintiff and defendant enter into an agreement to arbitrate certain differences between them, and the question is put in issue in an action whether future damages were considered by the arbitrators, it is a question of fact for the jury, and where there is substantial conflict in the evidence on that point, the verdict of the jury will not be disturbed. (*Frepons v. Grostein*, 671.)

6. The court properly instructed the jury to the effect that if they found that the respondent had submitted to the arbitrators not only the damages which had accrued, but also the damages which might accrue in the future, it would be a complete settlement of the matter, and also instructed them to determine from the facts as shown by the evidence what matters were submitted. (*Frepons v. Grostein*, 671.)

DAMS.

See Waters and Watercourses, 7-11.

DEFAULT JUDGMENT.

See Judgments, 5-7.

DISEASES.

See Animals.

DISMISSAL AND NONSUIT.

1. A nonsuit should only be granted when the evidence wholly fails to support the demand of plaintiff. (*Adams v. Bunker Hill etc. Co.*, 637.)

2. On a motion by the defendant for nonsuit after the plaintiff has introduced his evidence and rested his case, the defendant must be deemed to have admitted all the facts of which there is any evidence, and all the facts which the evidence tends to prove. (*Later v. Haywood*, 78.)

3. A case should not be withdrawn from the jury on motion for nonsuit after the plaintiff has introduced his evidence, unless the conclusion from the evidence necessarily follows, as a matter of law, that no recovery could be had upon any view which could reasonably be drawn from the facts which the evidence tends to establish. (*Later v. Haywood*, 78.)

4. If it is shown by the record that the demand for damages should, under the statute, have been litigated in a former action between the same parties, a motion for a nonsuit on that ground should be sustained. (*Shields v. Johnson*, 329.)

DISMISSAL AND NONSUIT (Continued).

5. Where it is shown that a motion for a nonsuit is interposed at the close of plaintiff's evidence on the ground that the subject matter of the action could have been litigated in a former suit, between the same parties, and after such motion is denied the defendant submits evidence in support of his defense, he waives his motion for a nonsuit, and must accept the verdict of the jury, unless he renews such motion at the close of all the evidence. (*Shields v. Johnson*, 329.)

DISTRICT ATTORNEY.

Attorneys other than the attorney general in this court, or the county attorney in the lower court, may assist in the prosecution by and with the consent of the prosecuting officer, and it is not error to allow such appearance in the trial court. (*State v. Steers*, 174.)

DISTRICT COURT.

See Courts, 1, 2.

DIVORCE.

Where it appears that the defendant has means with which to pay, and his wife is without means to properly prosecute her suit for a divorce, the court will allow her suit money and counsel fees. (*Day v. Day*, 556.)

ELECTRICITY.

See Municipal Corporations, 2.

EMBEZZLEMENT.

1. The crime of embezzlement is committed by an officer of any county, city or municipal corporation of this state when he fraudulently appropriates to his own use any money or property which he has in his possession or under his control by virtue of his trust as such officer. (*Rev. Stats.*, secs. 7065, 7066.) (*State v. Steers*, 174.)

2. An information that charges a sheriff of a county of this state with willfully, unlawfully, fraudulently and feloniously appropriating to his own use certain money paid to him in his official capacity is sufficient under the provisions of sections 7065, 7066, *supra*. (*State v. Steers*, 174.)

3. When the court on its own motion has fully and fairly instructed the jury on all the essential elements constituting the

EMINENT DOMAIN (Continued).

general benefit. That term is a flexible one, and necessarily has been of constant growth as new public uses have developed. (Potlatch Lumber Co. v. Peterson, 769.)

11. The power of eminent domain under our constitution and laws is given a degree of elasticity, thus making it capable of meeting new conditions and improvements of the ever-increasing necessities of society. (Potlatch Lumber Co. v. Peterson, 769.)

12. The person or corporation who exercises the power of eminent domain assumes certain obligations to the public, and the grant of that right carries with it the right of public supervision and reasonable control. (Potlatch Lumber Co. v. Peterson, 769.)

13. One who exercises the right of eminent domain in the improvement of non-navigable rivers in this state for the purpose of floating logs and timber products does not thereby secure the exclusive use and control of such streams, but such streams are open to the use of anyone who may have occasion to use them for any purpose. (Potlatch Lumber Co. v. Peterson, 769.)

16. Under the provisions of said section of the constitution the power of eminent domain may be exercised when necessary to the complete development of the material resources of the state, and the great lumbering interest of the state is one of the material resources of the state, and cannot be completely developed without the exercise of said power. (Potlatch Lumber Co. v. Peterson, 769.)

17. While said provisions of the constitution are not self-executing, or, in other words, do not furnish the procedure by which that power may be exercised, the procedure to subject lands to a public use has been provided by the legislature. (Potlatch Lumber Co. v. Peterson, 769.)

EMPLOYER'S LIABILITY.

See Master and Servant.

ESCROW.

See Vendor and Vendee.

ESTATES OF DECEDENTS.

See Executors and Administrators.

EVIDENCE.

1. The supreme court will not take judicial notice of the rules adopted by the district judges of the several districts of the state. (Powell v. Springston Lumber Co., 723.)

EXTRADITION (Continued).

he has been, as a matter of fact, a refugee from the justice of that state within the meaning of the federal constitution and the act of Congress authorizing interstate extradition. (In re Moyer, 250.)

2. The action and conduct of the chief executive of the state in which the accused was found in issuing the executive warrant and of the executive and ministerial officers acting in aid of his warrant, is a matter for the consideration of the courts of his state, subject to the reviewing authority of the federal courts in so far as the federal question is involved, and is not a question open to examination or consideration by the courts of a foreign state. (In re Moyer, 250.)

3. The warrant of the chief executive of the state surrendering an accused person, whether issued lawfully or unlawfully, has accomplished its purpose and become *functus officio* as soon as the accused is delivered into the jurisdiction of the demanding state, and the regularity of its issuance thereupon ceases to be a question for judicial inquiry on application by the prisoner for his discharge, where he is at the time held under due and legal process issued out of a court of competent criminal jurisdiction of the demanding state. (In re Moyer, 250.)

4. The motives which prompt the chief executive of a state to issue his warrant for the rendition of a prisoner are not proper subjects of judicial inquiry. Such inquiry would be opposed to public policy and the freedom of action of the executive department of government. (In re Moyer, 250.)

5. The fact that a wrong has been committed against a prisoner in the manner or method pursued in subjecting his person to the jurisdiction of a state, against the laws of which he is charged with having transgressed, can constitute no legal or just reason why he should not answer the charge against him, when brought before the proper tribunal. The commission of an offense in his arrest does not expiate the offense with which he is charged. (In re Moyer, 250.)

6. The jurisdiction of a court in which an indictment is found or an accusation is lodged is not impaired by the manner in which the accused is brought before the court. (In re Moyer, 250.)

7. In interstate extradition the prisoner is only held under the extradition process until such time as he reaches the jurisdiction of the demanding state, and is thenceforth held under the process issued out of the courts of that state, and it necessarily follows that there is no longer a federal question involved in his detention. (In re Moyer, 250.)

8. Return of the officer and answer of the prisoner examined and considered in this case, and, *held*, that the prisoner is being

GAMBLING (Continued).

sentence that may be imposed upon one convicted of gambling is a fine of not less than \$200 or imprisonment in the county jail for not less than four months. (*In re Burgess*, 143.)

2. The heaviest penalty that may be imposed upon one convicted of gambling is that prescribed by section 6313 of the Revised Statutes, and may amount to both a fine of not exceeding \$300 and imprisonment not exceeding six months. *State v. Mulkey*, 6 Idaho, 617, 59 Pac. 17, and *In re Rowland*, 8 Idaho, 595, 70 Pac. 610, approved and followed. (*In re Burgess*, 143.)

3. Where a defendant has been convicted of gambling in violation of the provisions of the anti-gambling law, a sentence and judgment that he pay a fine of \$250 and be imprisoned in the county jail for a period of three months, is within the authority of law and jurisdiction of the court and is a proper sentence and judgment. (*In re Burgess*, 143.)

HABEAS CORPUS.

1. The right to the guardianship of a minor cannot be tried upon *habeas corpus*. (*Andrino v. Yates*, 618.)

2. This proceeding was not for the purpose of setting the child free, but to determine whether the plaintiff was entitled to its custody. (*Andrino v. Yates*, 618.)

3. The jurisdiction of the question of the custody of a child under a writ of *habeas corpus* is of an equitable nature, and courts have large discretion in the matter. (*Andrino v. Yates*, 618.)

See Extradition.

HERDING.

See Animals.

HIGHWAYS.**Private Roads.**

1. Private or by roads may be opened for the convenience of one or more residents of any road district in the same manner as public roads, the person or persons for whose benefit the road is opened paying the damage awarded to land owners and keeping the road in repair. (Rev. Stats. 1887, sec. 933.) (*Latah County v. Hasfurther*, 797.)

2. One signature is sufficient to authorize the board of county commissioners to take the necessary steps to open a private or by-road under the provisions of section 933 of the Revised Statutes of 1887. (*Latah County v. Hasfurther*, 797.)

3. If the land owners are dissatisfied with the award for damages or with any of the proceedings of the board of county com-

HIGHWAYS (Continued).

missioners with reference to laying out and establishing a private or by-road, they may appeal to the district court, where the case will be heard *de novo*, or they may refuse to accept the award, and thus compel condemnation proceedings. (*Latah County v. Hasfurther*, 797.)

4. An appeal from the district court to the supreme court in cases of this character is under the provisions of section 4, page 273, Session Laws of 1899, under the title of "An act regulating appeals from the district court to the supreme court," etc. (*Latah County v. Hasfurther*, 797.)

5. Section 923 of the Revised Statutes of 1887, requiring the board of county commissioners to appoint three viewers, one of whom shall be a surveyor, does not make it the duty of the board to appoint the county surveyor, and when he is appointed one of the viewers, it is as essential that he take the statutory oath as either of the other viewers. (*Latah County v. Hasfurther*, 797.)

6. Where it is disclosed by the record that all of the viewers did not take the statutory oath, the proceeding is irregular and voidable, and should be reversed on appeal to the district court. (*Latah County v. Hasfurther*, 797.)

Highway by Prescription.

7. Under the provisions of section 851, Revised Statutes of Idaho, five years' use of a road or highway constitutes a public highway. (*Town of Juliaetta v. Smith*, 288.)

8. By the amendment to section 851 (Sess. Laws 1893, p. 12), five years' use and work by the proper authorities is required to constitute a public highway by prescription. (*Town of Juliaetta v. Smith*, 288.)

HOMICIDE.

Evidence examined in this case and held that it establishes such a state of culpable and criminal negligence or recklessness and disregard for the safety of human life as to support a verdict of manslaughter. (*State v. McGinnis*, 336.)

HUSBAND AND WIFE.

1. Under the act of March 9, 1903 (Sess. Laws 1903, 345), a married woman is given the absolute control of her separate property and estate, and has the unqualified right of contracting with reference to such property, and may sell and dispose of the same without the consent or approval of her husband. (*Bank of Commerce v. Baldwin*, 202.)

2. The act of March 9, 1903, has reference only to the separate property of the wife, and the management and control thereof, and the carrying on of business therewith, and the sale or disposal

HUSBAND AND WIFE (Continued).

thereof and contracts in reference thereto or for the benefit thereof. (Bank of Commerce v. Baldwin, 202.)

3. A married woman cannot bind herself personally for the payment of a debt that was not contracted for her own use or for the use or benefit of her separate estate, or in connection with the control and management thereof or in carrying on or conducting business therewith. (Bank of Commerce v. Baldwin, 202.)

4. *Held*, under the evidence in this case that the trial court was justified in finding that the premises in dispute were not the separate property of the appellant. (Coleman v. Jagers, 125.)

INJUNCTION.***In General.***

1. Where the district judge granted a temporary injunction at the time of filing the complaint and the issuance of the summons, and thereby directed the defendant to appear at a time and place specified to show cause why the injunction should not be continued in force *pendente lite*, and the sheriff was unable to find the defendant corporation's statutory agent or anyone upon whom service of process might be made, and returned the writ unserved, and the judge thereupon issued a second order in the same form and to the same effect as the first, with the exception that the time fixed for the defendant to appear and show cause was extended to a more remote period, and such second order was returned unserved for the same reason given for failure to serve the first, and a third order was granted in the same form and to the same effect, except that the time for appearance was extended still further, and this latter order was duly served, the fact that no affidavits were filed prior to the issuance of the second and third orders is not a sufficient or legal ground for dissolving the injunction as being in violation of section 4289, Revised Statutes. (Powell v. Springston Lumber Co., 723.)

2. *Id.*—In such cases the legal discretion of the court has already been invoked and exercised in the first instance, and the subsequent orders amount in substance and effect to nothing more than an extension of the time in which the defendant is required to appear and show cause. (Powell v. Springston Lumber Co., 723.)

Restraining Enforcement of Judgment.

3. A court of equity will not grant an injunction to restrain the enforcement of a judgment at law on the grounds of want of consideration or that the contract sued on is against public policy, where the defendant, through negligence of his attorneys, fails to set up such defenses. (Donovan v. Miller, 600.)

INSURANCE (Continued).

adjustment of the loss, such facts establish a sufficient *prima facie* case of waiver of proofs to entitle the same to go to the jury. (Allen v. Phoenix Assurance Co., 653.)

4. Where an insurance policy contains a clause providing that the policy shall be void "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple," and it is shown that the property insured was situated upon a government homestead owned and claimed by the insured in which the legal title remained in the United States government, and on which final proof was not made until after the loss by fire. *Held*, that there was not such a failure of title as to defeat the right of recovery under this stipulation as to ownership. (Allen v. Phoenix Assurance Co., 653.)

5. *Id.*—In such a case the sole and entire burden of the loss, in case of loss, falls upon the insured (the homesteader), and the government has no interest in the property destroyed, and suffers no loss on account thereof. (Allen v. Phoenix Assurance Co., 653.)

6. Where it is shown that the insured truthfully and correctly stated the nature and condition of his title in making his application for insurance, he will not be precluded from recovering in case of loss on account of a contrary statement as to title inserted in the policy by the underwriter. (Allen v. Phoenix Assurance Co., 653.)

7. Assignment or hypothecation of a policy of fire insurance of the face value of \$2,000 to a creditor, as collateral security for an extension of time on a debt of \$300, does not constitute or amount to an assignment of the policy in violation of the stipulation contained therein to the effect that the policy shall be void if "assigned before loss." (Allen v. Phoenix Assurance Co., 653.)

Life Insurance.

8. Where, in an application for life insurance, the applicant stipulates and agrees that he waives all provisions of law preventing a physician from testifying as to any information acquired by him while attending his patient or rendering him incompetent as a witness as provided in section 5958, Revised Statutes, such waiver is valid, and entitles the beneficiary named in the policy, as well as the insurer, in an action upon a policy issued on such application, to call and examine the physician who attended the insured during his last sickness and have him answer questions which, but for such waiver would be regarded as privileged communications that the witness could not disclose. (Trull v. Modern Woodmen of America, 318.)

See Bills and Notes.

IRRIGATION.

See Waters and Watercourses.

JOINT STOCK COMPANIES.

See Associations.

JUDGES.

See Courts; Justice's Court.

JUDGMENT.

Foreclosure of Contractor's Lien.

1. An action was brought to recover a balance due on a contract for the construction of a dwelling-house. The defendants answered, putting in issue the material allegations of the complaint, and filed a cross-complaint wherein they demanded damages for the failure of the plaintiff to complete his contract. Certain questions in the foreclosure suit were submitted to the jury, which they answered, and also brought in a general verdict for the plaintiff. The court thereupon set aside the general verdict and entered judgment without making any further findings than those made by the jury. *Held*, that the jury did not find upon all of the material issues made by the pleadings, and for that reason the judgment must be reversed, as all of the material issues made by the suit to foreclose and the cross-action for damages were not found upon. (*Sandstrom v. Smith*, 446.)

2. This being a suit in equity and a cross-action at law, either party had the right to have the questions in the law action determined by the jury, and the court of its own volition might submit certain questions involved in the suit in equity to the jury. (*Sandstrom v. Smith*, 446.)

3. In such a case the court may adopt the findings of the jury as its findings; but if the jury fails to find upon any of the material issues made by the pleadings, the court should find upon those issues before entering judgment. (*Sandstrom v. Smith*, 446.)

Foreign Judgment—Limitation of Actions.

4. Where W. & Co. obtained a judgment against C. and others, in Nebraska in April, 1895; before any part of said judgment was paid, C. moved to Idaho in 1897, and has continued to so reside until the commencement of this action; C. was in Nebraska in 1905 when service of an order or motion for revivor of said judgment was had upon him; thereafter and on the tenth day of October, 1905 C. appeared in court by attorney when an order of revivor was made in said court: *Held*, that such order of revivor gave new life to the judgment, and the statute of limitations of this state does not

JUDGMENT (Continued).

begin to run until after such revivor, and that an action may be commenced in the courts of Idaho any time within six years after such order of revivor. (*Leman v. Cunningham*, 135.)

Setting Aside Default.

5. Affidavits on motion to set aside a default judgment under the provisions of section 4229 of the Revised Statutes must show that the default occurred through mistake, inadvertence, surprise or excusable neglect. (*Western Loan and Savings Co. v. Smith*, 94.)

6. An application to set aside and vacate a default judgment is addressed to the sound discretion of the court to which the application is made, and unless it appear that such discretion has been abused, the order will not be disturbed on appeal. (*Western Loan & Savings Co. v. Smith*, 94.)

7. The showing made in this case reviewed and held insufficient to authorize the setting aside a default judgment. (*Western Loan & Savings Co. v. Smith*, 94.)

Findings.

8. The following finding held insufficient to support a judgment, to wit: "That all the issues of fact raised by the pleadings in this case are hereby found and decided in favor of the defendant and against plaintiff." (*Wood v. Broderson*, 190.)

Relief from Judgment.

9. Courts will not relieve against a judgment in an independent suit for mere mistakes at law. (*Donovan v. Miller*, 600.)

10. The erroneous advice of an attorney is not such a mistake as will entitle a party to relief from a judgment. (*Donovan v. Miller*, 600.)

See Injunctions, 3-5.

JUDICIAL NOTICE.

See Evidence.

JURISDICTION.

See Courts; Venue.

JURY.

Where the respective parties have stipulated and agreed to the appointment of a referee to take testimony and report the same to the court, and they make no demand for a jury, they will be deemed by such act to have waived a jury, even if the case were one in which they would otherwise be entitled to a jury trial. (*Lindstrom v. Hope Lumber Co.*, 714.)

See Judgments, 2.

JUSTICE.

See Courts, 11, 12.

JUSTICE'S COURT.

1. On appeal from a justice court to the district court, where the appellant gives "an undertaking for the payment of costs on the appeal to the district court and for a stay of execution," and the sureties are bound in a sum exceeding \$100, though not in an amount sufficient to stay the proceedings, and the undertaking contains all the obligations required in appeal bonds, such undertaking will be held sufficient to perfect the appeal, and in such case a motion to dismiss the appeal was properly overruled by the district court. (*Edminston v. Steele*, 613.)

2. Where there is no uncertainty as to the conditions and obligations of an undertaking on appeal, the bond will be held effectual for the purposes of the appeal, although coupled with an invalid or insufficient stay bond. (*Edminston v. Steele*, 613.)

3. Where an appeal is taken from a justice's court and the appellant claims a stay of proceedings, under section 4842, Revised Statutes, it is necessary to give two obligations (which may both be in the same undertaking), one in the sum of \$100, to cover costs of the appeal, and the other in twice the amount of the judgment, including costs. (*Wilson v. Doyle*, 295.)

4. An undertaking in twice the amount of the judgment, including costs, for the stay of proceedings is ineffectual for any purpose where there is no obligation "for the payment of the costs on the appeal," and in such case the appeal is properly dismissed. (*Wilson v. Doyle*, 295.)

LANDLORD AND TENANT.

1. A landlord cannot, after he has rented rooms for a certain purpose, so tear down and mutilate the building as to render such rooms unsuitable for the purpose for which they were leased, without being liable for damages, unless he first obtain permission of the lessee. (*Frepons v. Grostein*, 671.)

2. If a landlord make a leased premises unfit for the uses for which it was leased, he cannot recover rent for the leased premises if the lessee abandons the same. (*Frepons v. Grostein*, 671.)

See Fixtures.

LARCENY.

1. Where it is alleged in the information that the ownership of the stolen property is in one person, and on the trial another person testifies that he owns a half interest in such property, and

LARCENY (Continued).

thereafter the former is recalled and explains the ownership of each, and the question of ownership is fairly submitted to the jury upon the evidence, and by an instruction given by the court. *Held*, that such instruction was properly given. (State v. Cotterel, 572.)

2. Where it is alleged in the information that the stolen property is owned by a certain person and the evidence shows that such person only has a half interest therein, such variance is not fatal, and does not entitle the defendant to an acquittal. (State v. Cotterel, 572.)

3. Where it is shown that W. took into his possession a colt belonging to K. and branded such animal, claiming it to be his property, and on a trial upon the charge of grand larceny he is found guilty as charged, the judgment will not be reversed where it is shown that all the facts connected with the alleged larceny were before the jury, and that the evidence was sufficient to warrant the verdict. (State v. Williams, 483.)

4. An information that charges the unlawful and felonious taking of a "gray horse colt" charges grand larceny under section 7048, Revised Statutes. (State v. Williams, 483.)

5. Where the facts and circumstances established on the trial show that the stolen cattle had been gathered on the range by others and driven some distance, and the defendant met those who had gathered them, by agreement, and assisted them in mutilating the brands on the cattle and driving them across Snake river into Oregon, the verdict of guilty will not be reversed on the ground of insufficiency of the evidence. (State v. Morse, 492.)

6. Evidence examined and held sufficient to sustain verdict. (State v. Wright, 212.)

LEGISLATURE.

See Constitutional Law, 2, 3.

LIMITATIONS OF ACTIONS.

See Judgments, 4.

LOGGING.

See Waters and Watercourses, 7-11.

MALICIOUS PROSECUTION.

1. It is not necessary in an action for malicious prosecution to allege that all of the defendants combined in instituting the proceedings complained of. If, after the proceedings were commenced, they,

MALICIOUS PROSECUTION (Continued).

without probable cause and with malice, participate voluntarily in the prosecution, they may be joined in an action as defendants with the person or persons who instituted the action. (*Russell v. Chamberlain*, 299.)

2. Want of probable cause and malice must coexist. (*Russell v. Chamberlain*, 299.)

3. Actions for malicious prosecutions are not favored in law and have been hedged about by limitations more stringent than in many other acts causing damage to another. (*Russell v. Chamberlain*, 299.)

4. *Held*, that the complaint states a cause of action and that the court erred in sustaining the demurrers thereto. (*Russell v. Chamberlain*, 299.)

MANDAMUS.

1. Under the provisions of section 4982, Revised Statutes, where issues of fact are made by a return to an alternative writ of mandate, neither of the parties to the proceeding is entitled to a trial of such issues by a jury as a matter of right, as that is left to the sound discretion of the court. (*Nelson v. Steele*, 762.)

2. The proceeding for a writ of mandate under the provisions of the statute of Idaho is a special proceeding of a civil nature, and is not a suit at common law or a civil action, and neither party to such proceeding is entitled as a matter of right to a trial by jury. (*Nelson v. Steele*, 762.)

3. The seventh amendment to the constitution of the United States is not applicable to a proceeding to obtain a writ of mandate under the provisions of the statute of Idaho. (*Nelson v. Steele*, 762.)

4. Special proceedings of a civil nature provided for in title 1, chapter 1, part 3, commencing with section 4955 of the Revised Statutes, are not civil actions such as are referred to in section 4020, Revised Statutes. (*Nelson v. Steele*, 762.)

5. The proceeding in the case at bar is not a suit at common law nor a civil action under our code, but a special proceeding, and the trial of the questions of fact in such proceeding may, in the discretion of the court, be submitted to a jury. (*Nelson v. Steele*, 762.)

See *Waters and Watercourses*, 3-6.

MARRIED WOMEN.

See *Husband and Wife*.

MASTER AND SERVANT.

Employer's Liability for Injury to Employees.

1. Where a complaint alleges the injury to plaintiff in plain and concise language, and that such injury resulted from the carelessness and negligence of defendant in the construction and operation of its sawmill and appliances thereto, and that plaintiff was in no way guilty of contributory negligence, and used ordinary prudence and care in the performance of the labor assigned to him, and in the performance of which he was injured, it is not subject to demurrer. (Crawford v. Bonners Ferry Lumber Co., 678.)

2. When the plaintiff has sufficiently plead the carelessness and negligence in the construction and operation of defendant's sawmill and other machinery connected therewith, and that through no fault of his he was injured and damaged by defendant whilst in its employ and performing the work prescribed for him by his employer, a demurrer to such complaint should be overruled, and defendant permitted to answer setting up its defense; the burden of proof is upon defendant to show that plaintiff was guilty of contributory negligence. (Crawford v. Bonners Ferry Lumber Co., 678.)

3. Where the evidence shows that a part of machinery of respondent was in a damaged condition, and that by reason thereof an employee in the discharge of his duty could become entangled in such machinery and lose his life or suffer great bodily injury through no fault of his, it is a *prima facie* case, and it is error to sustain a motion for nonsuit. (Adams v. Bunker Hill etc. Min. Co., 637.)

4. In an action against the master for damages caused by the death of the servant as a result of the master's negligence, the presumptions which arise in favor of the instincts of self-preservation and the known disposition of men to avoid injury and personal harm to themselves, constitute a *prima facie* inference that the servant was at the time in the exercise of ordinary care, and was himself free from contributory negligence. In case where the injury complained of resulted in the death of the injured person, the law presumes that such person exercised the measure of care which it was his duty to exercise. (Adams v. Bunker Hill etc. Min. Co., 643.)

5. Where the evidence in a personal injury case is so uncertain as to leave it equally clear and probable that the injury resulted from any one of a number of causes that might be suggested, then and in that case a verdict for plaintiff would be pure speculation and could not be sustained; but where the evidence, although circumstantial, is such that it would appear possible that the injury resulted

MASTER AND SERVANT (Continued).

from any one of several causes, and yet it points to the *greater probability* that it resulted from the specific cause charged by the plaintiff, a nonsuit should not be granted. In the latter case the jury would be justified in returning a verdict in favor of the plaintiff, although it be *possible* that the injury may have resulted from some other cause. The law does not anticipate or attempt to exclude mere possibilities. (*Adams v. Bunker Hill etc. Min. Co.*, 643.)

6. If, upon any fair construction, that a reasonable man might put upon the evidence, or any inference that might reasonably be drawn therefrom, the conclusion of negligence can be arrived at or justified, then the defendant is not entitled to a nonsuit, but the question of negligence should go to the jury. (*Adams v. Bunker Hill etc. Min. Co.*, 643.)

7. Where it does not appear that the inspection and repair of the machinery with which the servant was working was a part of the servant's employment, and it also appears that the master was in a more favorable position to know its condition and to inspect and repair it, and the disrepair and unsafe condition of the machinery is shown, and was not obvious to the servant, and injury resulted therefrom, and the servant was not familiar with or accustomed to such machinery, and this was known to the master, such facts make a *prima facie* showing of negligence on the part of the master. (*Adams v. Bunker Hill etc. Min. Co.*, 643.)

MECHANIC'S LIEN.

See Judgment, 1.

MINES AND MINING.

1. Evidence of the indications miners had successfully followed in the same district and on contiguous ground in attempting to find a lode or mineral deposit is admissible in determining as to whether or not a valid mineral discovery has been made by one who attempted to locate a lode claim on similar indications and showing upon adjacent ground. (*Ambergris Mining Co. v. Day*, 108.)

2. It is incompatible with the spirit of judicial inquiry to allow a litigant to introduce, for comparison, evidence of indications and conditions found on a particular mining property which led up to rich ore body over which he has absolute control, and from which he may exclude every other person, unless such litigant permit his adversary to examine and inspect such property for the purpose of introducing rebuttal evidence if he so desires; and where such evidence is admitted and examination of the property is denied to

MINES AND MINING (Continued).

adverse party, a new trial will be granted. (*Ambergris Mining Co. v. Day*, 108.)

3. As between a prior and subsequent locator of the same ground as a lode claim, the courts will view the evidence tending to establish the senior locator's discovery in the most favorable light such evidence will reasonably justify. (*Ambergris Mining Co. v. Day*, 108.)

4. Under the evidence in this case, held, that the annual assessment work on the quartz mining claims located and known as the "Mother Lode," the "Northeastern Extension of the Mother Lode" and "Canary" mining claims for the year 1902, was done. (*Smith v. Mountain Gulch Mining etc. Co.*, 219.)

MUNICIPAL CORPORATIONS.

1. The doctrine announced in *Carson v. City of Genessee*, 9 Idaho, 244, holding cities and villages liable for negligence in the maintenance of their streets and thoroughfares in a reasonably safe condition for use by travelers in the usual modes, approved and followed. (*Eaton v. City of Weiser*, 544.)

2. Running and operating an electric light system by a municipality and the sale of electric light to private consumers is not one of its public and governmental powers and duties, but is rather a proprietary and private right and power, for the careless and negligent exercise of which the municipality will be held liable in damages the same as a private corporation or individual would be exercising like rights. (*Eaton v. City of Weiser*, 544.)

3. Municipal ownership, in the usual and common acceptance of that term, must of necessity carry with it the same duty, responsibility and liability on account of negligence that is imposed upon and attaches to private owners of similar enterprises. (*Eaton v. City of Weiser*, 544.)

4. Where a city is maintaining a wire across one of its public thoroughfares for the purpose of carrying and distributing a powerful and dangerous force like electricity, it must be held to the duty of exercising such diligence and care in maintaining and using the same as is commensurate with the dangers of the force which it is handling, in order that it may avoid and prevent injury to those rightfully engaged in their various pursuits and employments. (*Eaton v. City of Weiser*, 544.)

5. Evidence examined in this case and held that it does not establish such contributory negligence on the part of the plaintiff as to prevent and preclude him from recovering damages for the injuries sustained. (*Eaton v. City of Weiser*, 544.)

NAVIGABLE WATERS.

1. The legislature cannot by legislative act impress the character of navigability on a stream that is not navigable, as a stream not navigable in fact cannot be made so by legislation. (*Potlatch Lumber Co. v. Peterson*, 769.)

2. Navigable streams are public highways over which every citizen has a natural right to carry commerce in the mode, manner and by the means best adapted to serve the purposes of the commerce in which he is engaged. In so doing he must have due consideration and reasonable care for the equal right of every other citizen upon the waters of such stream. (*Powell v. Springston Lumber Co.*, 723.)

See Eminent Domain, 4.

NEGLIGENCE.

See Damages; Master and Servant.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

Practice on Application for New Trial.

1. Under the provisions of section 7953 of the Revised Statutes where a defendant serves and files his notice of intention to move for new trial, and states therein the grounds upon which his application is based, and the trial court or judge and respective counsel treat such notice as an application for a new trial, this court will so treat it, and not dismiss the appeal on the ground that a formal application was not made. (*State v. Wright*, 212.)

2. The granting of a new trial is largely in the discretion of the trial court, and when based on affidavits of newly discovered evidence that are only corroborative and cumulative of the evidence introduced on the trial, the decision of the court on the motion for a new trial will not be disturbed. (*Heckman v. Espey*, 755.)

3. Where the attorneys for the respective parties have signed a stipulation waiving notice of the time and place of hearing and passing upon a motion for a new trial, the trial judge will be justified in hearing and passing on the same without notice to the adverse party. (*Buckle v. McConaghy*, 733.)

4. Where the trial court grants a new trial without designating the grounds upon which the order is based and an appeal is prosecuted from such order, the appellate court will only examine the

NEW TRIAL (Continued).

assignments of error made in the lower court and the grounds of the motion for a new trial to the extent of ascertaining whether or not the order can be sustained on any ground named in the motion and assignments and specifications of error. (*Buckle v. McConaghy*, 733.)

5. Where there is a substantial conflict in the evidence, and the trial judge who heard the case grants a new trial, the order will not be disturbed on appeal. (*Buckle v. McConaghy*, 733.)

Newly Discovered Evidence.

6. *Held*, that under the evidence and affidavits of newly discovered evidence and errors assigned in admitting and rejecting evidence, the court did not err in denying a new trial. (*State v. Cotterel*, 572.)

7. A new trial will not be granted on the ground of newly discovered evidence, unless it is shown that the introduction of such evidence might change the result of the verdict of the jury in another trial, and sufficient reason must be shown why such evidence could not have been presented at the former trial. (*State v. Bond*, 424.)

8. *Held*, that the court did not err in refusing to grant a new trial on the ground of newly discovered evidence. (*State v. Morse*, 492.)

9. Upon application for a new trial on the ground of newly discovered evidence, a new trial will not be granted unless due diligence is shown, and that it is probable a different result might follow another trial. (*State v. Williams*, 483.)

NONSUIT.

See Dismissal and Nonsuit.

NUISANCE.

1. Where the plaintiff shows by his complaint and affidavits that the defendant municipality is maintaining a nuisance specially injurious to the complainant, and the defendant does not deny the existence of the nuisance, but alleges that it has taken steps to abate the same and that it means and intends to prevent any repetition or recurrence of the matters charged as constituting the nuisance, and affidavits are produced showing that conditions have not been materially changed and that the cause of complaint still exists, a temporary injunction ought to issue, and it is error to refuse such relief. (*Shreck v. Village of Coeur d'Alene*, 708.)

2. Showing made in this cause examined and held sufficient to entitle plaintiff to an injunction *pendente lite*. (*Shreck v. Village of Coeur d'Alene*, 708.)

OFFICERS.

Removal from Office.

1. Under the provisions of section 7459 of the Revised Statutes, the allegations of the information should be made positively, when the facts are of record and accessible, or within the personal knowledge of the informant; otherwise they may be made on information and belief. (Corker v. Pence, 152.)

2. Under the provisions of section 7459 of the Revised Statutes, the information is sufficient if it charges the defendant with knowingly, willfully and intentionally charging and collecting illegal fees, specifying them, or with knowingly, willfully and intentionally refusing to perform, or neglecting to perform, an official duty pertaining to his office, specifying such duty. (Corker v. Pence, 152.)

3. Under the provisions of said section there are but two offenses for which a defendant may be removed from office; the first is the charging and collecting illegal fees for services rendered or to be rendered in his office; and, second, neglecting to perform official duties pertaining to his office required by law. (Corker v. Pence, 152.)

4. County officers, for all other willful or corrupt misconduct in office, other than that mentioned in section 7459, may be removed under the provisions of section 7445 et seq., of the Revised Statutes. (Corker v. Pence, 152.)

5. Under the provisions of section 7459, a corrupt official may be prosecuted by a private person for the acts therein specified, while under the provisions of section 7445 the accusation must be by the prosecuting attorney, or presented by the grand jury for other willful or corrupt misconduct in office. (Corker v. Pence, 152.)

6. Where a board of equalization meets and proceeds to equalize the assessment of the property of the county, but fails to make such equalization and assessment in accordance with the views of others, and if they willfully and corruptly equalize such assessments, they cannot be removed from office under the provisions of said section 7459. The remedy is provided by the provisions of section 7445. (Corker v. Pence, 152.)

7. The allegation in an information that the board of county commissioners did not make "necessary" and "proper" rules and regulations to prevent the outbreak and spread of contagious and infectious diseases, is not a sufficient allegation that no rules or regulations in regard thereto had been made. (Corker v. Pence, 152.)

8. A failure to properly itemize a claim against the county is not a cause for the removal of an officer under the provisions of said section 7459. (Corker v. Pence, 152.)

OFFICERS (Continued).

9. An allowance of a claim against the county without its being accompanied by a proper voucher is not a cause for removal under the provisions of section 7459. (*Corker v. Pence*, 152.)

Abolishing Office.

10. The abolishment of an appointive office by an act of the legislature and imposing the duties of such office on another officer without enumerating in detail such duties, in no manner violates the provisions of section 18, article 3 of the constitution. (*Noble v. Bragaw*, 265.)

Expenses of Officers.

11. Under the provisions of an act approved March 14, 1901 (Sess. Laws 1901, p. 227), which provides for the payment of actual and necessary expenses of certain county officers, is included the board of such officers when absent from their residences in the performance of the official duties of their several offices. (*Corker v. Pence*, 152.)

See Clerk of Courts.

PARDONS.

1. The board of pardons is a branch of the executive department of the state government and its powers and prerogatives, as such, are those of granting clemency to convicted prisoners, and it has no power to increase or extend penalties or punishments pronounced by the sentence of a court. (*In re Prout*, 494.)

2. The board of pardons has power to parole prisoners upon such terms and conditions as they may see fit, so long as those terms and conditions are neither immoral nor illegal. (*In re Prout*, 494.)

3. Conditions attached to a parole or pardon by the board of pardons that are to extend beyond or be performed after the expiration of the term for which the prisoner was sentenced, are illegal and cannot be enforced after the expiration of the term for which the prisoner was sentenced. (*In re Prout*, 494.)

4. A prisoner who had been paroled by the board of pardons and thereafter rearrested and returned to the penitentiary is entitled to his discharge at the expiration of the period of time for which he was sentenced by the court, and he cannot be lawfully detained under such sentence for the purpose of serving an additional term equalling the time he was out on parole. (*In re Prout*, 494.)

PARENT AND CHILD.

1. Under the provisions of section 5774, Revised Statutes, the parent is entitled to the guardianship of his minor child when

PARENT AND CHILD (Continued).

he is competent to transact his own business and not otherwise unsuitable as guardian. (*Andrino v. Yates*, 618.)

2. The legal right to the custody of a minor may be abandoned or forfeited by the acts or conduct of the parent, and in such case he is equitably estopped from asserting such legal right. (*Andrino v. Yates*, 618.)

3. Where the legal right of the parent is not clear, the best interest of the child will govern the decision of the court. (*Andrino v. Yates*, 618.)

4. When it appears that a child has resided with its aunt from the time it was about two and one-half years old until it is nearly twelve years of age without having seen its mother, and that conditions are such, and made so by the acts of the parent, that the care and custody of the child cannot be changed without endangering the happiness and welfare of the child, the parent has become, in the language of section 5774, Revised Statutes, "unsuitable" for possession of the child. (*Andrino v. Yates*, 618.)

5. In such cases the welfare of the child is the main consideration for the court. (*Andrino v. Yates*, 618.)

6. In cases of doubt and difficulty the court may examine the minor, when it is of sufficient age and discretion, as to its wishes and desires in the matter; not that its wishes must control in the matter, but that the court might more wisely arrive at a just conclusion in the case. (*Andrino v. Yates*, 618.)

PAROLE OF PRISONERS.

See Pardon.

PARTNERSHIP.

1. Upon the death of one partner, the surviving partner may continue the partnership business by and with the consent of the executor or administrator of the estate of the deceased and the approval of the probate court. (*McElroy v. Whitney*, 512.)

2. Unless by consent of the executor or administrator of the estate of the deceased partner, and the approval of the probate court, it is the duty of the surviving partner to settle the affairs of the copartnership as speedily as the best interests of the business of the copartnership will permit. (*McElroy v. Whitney*, 512.)

3. Where the complaint and answer pray for the appointment of a referee to take an accounting of the affairs of the copartnership and report his findings to the court as to the indebtedness of one to the other, and such report or findings show such indebtedness, and that all of the partnership affairs have been considered by

PARTNERSHIP (Continued).

the referees, the court may adopt such findings as the findings of the court. (McElroy v. Whitney, 512.)

4. Whilst the general rule is that the surviving partner is not entitled to a salary or compensation for managing and settling up the partnership business, it has its exceptions when a partnership has been carried on for some time after a dissolution by death, and such continuance has proved to be beneficial. (McElroy v. Whitney, 512.)

See Associations.

PHYSICIANS.

See Witnesses, 6, 7.

PLEADING.

Under the provisions of section 4168 of the Revised Statutes, the complaint is only required to contain the title of the court and cause, a statement of the facts constituting the cause of action in ordinary and concise language, and the demand for relief, and the district court is authorized to grant such relief, whether in equity or at law, as the parties are entitled to under their allegations and proof. (Coleman v. Jagers, 125.)

See Actions.

PRACTICE.

See Appeal and Error; Technicalities.

PRELIMINARY EXAMINATION.

1. Where two parties are separately charged with a felony, upon the preliminary examination of one, the other is called as a witness on behalf of the prosecution, he may refuse to answer any questions either on his examination in chief or on cross-examination that would tend in the least to incriminate him. (State v. Bond, 424.)

2. A motion to set aside the information on the ground that the witness or accomplice refused to answer certain questions on cross-examination at the preliminary examination that in the opinion of the witness tended to incriminate her, will not be sustained. (State v. Bond, 424.)

PRINCIPAL AND AGENT.

See Brokers.

PRIVATE WAYS.

See Highways.

PRIVILEGED COMMUNICATIONS.

See Witnesses, 6-8.

PROBATE COURT.

See Courts, 8-10.

PROBATE LAW.

See Executors and Administrators; Wills.

PUBLIC ADMINISTRATORS.

1. A county treasurer is, under the constitution and laws of this state, *ex officio* public administrator, and all fees and compensation received by him in his official capacity and as public administrator must be accounted for and reported to his county, and cannot be retained by him for his personal or individual use. (In re Rice, 305.)

2. By virtue of holding the office of county treasurer, the individual becomes *ex-officio* public administrator, and is thereby and for that reason alone, qualified to become an administrator of an estate under subdivision 9 of section 5351, and section 5682, Revised Statutes, and any and all fees and compensation received by him by reason of discharging such duties belong to the county, and must be accounted for to the county. (In re Rice, 305.)

QUIETING TITLE.

1. Under the provisions of section 4538 of the Revised Statutes, an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim. (Coleman v. Jagers, 125.)

2. Under the jurisdiction and practice in equity, independent of statute, a bill to quiet title cannot be maintained unless the possession and legal title are in the complainant, but that rule of equity practice has been greatly modified by the provisions of section 4538 in this state, and an action may be maintained although the plaintiff have neither the possession nor the legal title thereto. (Coleman v. Jagers, 125.)

3. Under the provisions of said section 4538, a suit may be brought by anyone claiming some right or interest in land to determine any adverse claim thereto. (Coleman v. Jagers, 125.)

QUO WARRANTO.

See Officers.

RAPE.

1. The fact that the state accuses a defendant with rape in having had carnal knowledge of a female who was at the time of unsound mind and incapable of giving consent does not *per se* establish the incompetency of such female to testify against the accused. (State v. Simes, 310.)

2. In such case the accused may object to the witness testifying on the grounds of incompetency, and the court will examine into and pass upon the grounds of the objection in the same manner and to the same extent as if made against the competency of any other witness. (State v. Simes, 310.)

3. Where respondent was convicted of the statutory crime of rape, and it is shown that the evidence was conflicting on material questions involved in the trial, and the trial judge sustains a motion for a new trial without stating whether his order was based upon the insufficiency of the evidence or errors of law occurring at the trial, this court will not reverse such order unless error is manifest from the record. (State v. Driskell, 245.)

RECEIVERS.

1. Upon a proper showing a receiver will be appointed for a corporation *pendente lite*. (Hall v. Nieuirk, 33.)

2. Under the provisions of subdivisions 5 and 6 of section 4329 of the Revised Statutes, a receiver will be appointed where it is shown that the corporation is insolvent or in imminent danger of insolvency, and in all cases where receivers have heretofore been appointed by the usages of the courts of equity. (Hall v. Nieuirk, 33.)

3. Under the allegations of the complaint, held that the court erred in refusing to appoint a receiver. (Hall v. Nieuirk, 33.)

4. Under our statute an appointment of a receiver does not necessarily cause a dissolution of the corporation, unless the court so directs; the receiver may be appointed simply to manage the affairs of the company during the pendency of the litigation. (Hall v. Nieuirk, 33.)

5. Upon the application of a stockholder where it is shown that the directors and officers of the corporation are mismanaging its affairs for their own personal advantage and gain, and where it is shown that the profits of the business of the corporation are being absorbed by such mismanagement in paying the salaries of favorite employees, whose services are not necessary to the proper conduct of the business of the corporation, and where gross mismanagement is shown, which if continued would necessarily result in insolvency of the corporation, a receiver should be appointed. (Hall v. Nieuirk, 33.)

RECEIVERS (Continued).

6. Where a mortgage provides that the mortgagor shall keep the property insured, and that in case he fails to do so the mortgagee may insure, and that all sums paid by the mortgagee for insurance shall become a part of the mortgage debt and be secured by the mortgage lien, a failure to insure by the mortgagor will not amount to such waste of the security as to authorize the appointment of a receiver to take charge of the property. (*Eureka Mining etc. Co. v. Lewiston Navigation Co.*, 472.)

7. Where A takes a mortgage on a boat that is plying on an interstate stream in such manner that its use in navigating such stream must necessarily take it beyond the jurisdiction of the state in which the mortgage was executed, and it is stipulated in the mortgage that the mortgagor shall not remove the "vessel beyond the limits of the United States," a removal beyond the jurisdiction of the state and its use in navigation of a portion of the same stream, where it is no more dangerous or perilous will not constitute grounds for the appointment of a receiver to take charge of the property, where it appears that the vessel is in charge of a competent and skillful captain and crew. (*Eureka Mining etc. Co. v. Lewiston Navigation Co.*, 472.)

8. Where a mortgage provides that the mortgagee shall insure a boat which it is understood shall ply on certain designated waters, and he fails to do so for the reason that the risk is so great on a vessel plying on those waters that insurance cannot be obtained, the failure of the mortgagor to insure will not of itself warrant the appointment of a receiver for such property. (*Eureka Min. etc. Co. v. Lewiston Navigation Co.*, 472.)

REFERENCE.

1. A court has no power to arbitrarily send an ordinary action at law to a referee for trial against the objection of either party to the litigation, and this, whether the suit requires the examination of a long account or not. (*Russell v. Alt*, 789.)

2. Reference is confined to equity cases only; under the provisions of our constitution the right to trial by jury is never to be denied in law cases. (*Russell v. Alt*, 789.)

3. Where the issues joined by the pleadings cover a claim for injury and damages suffered under a given and specific contract, and when the parties come to making their proofs before a referee, they stipulate and agree that "a full and complete accounting of all the matters and things between plaintiff and defendant shall be had and taken" under another and separate contract and transaction, "the same as if it were a part of the complaint," the losing party cannot be heard on appeal to complain of the evidence and

REFERENCE (Continued).

findings touching such new issue as being outside of the issues made by the pleadings. (*Lindstrom v. Hope Lumber Co.*, 714.)

4. Where by consent of both parties evidence is taken touching differences not covered by the issues, and no objection is made thereto prior to findings and judgment, the pleadings will be treated on appeal as if they had been so amended as to make the issues covered by the proofs. (*Lindstrom v. Hope Lumber Co.*, 714.)

5. Where the record fails to show when the report of a referee was submitted to the court, but does show that the last testimony was taken by him over eighteen months prior to the date of filing the report, and that the attorneys for both sides were present at all the hearings before the referee, and the court makes and files his findings and judgment on the same date on which the report is filed, the losing party will not be heard on appeal to complain that he had no time or opportunity to move against the report or any part thereof, or to move to purge the evidence submitted by the report. In such case the losing party is not free from negligence and laches. (*Lindstrom v. Hope Lumber Co.*, 714.)

6. In an action for accounting in the settlement of a partnership business, where the court appoints a referee and authorizes and directs him to take an accounting of the business and transactions of the partnership, the parties are entitled to a statement from the referee of all the items of account between them, and to have the same reported to the court showing the items allowed and rejected in favor of and against each party. (*McElroy v. Whitney*, 527.)

SALES.

1. Where the contract of sale of a threshing-machine contains a warranty that is limited and conditioned by the following provision: "Continued possession or use of machinery for six days shall be conclusive evidence that the warranty is fulfilled to the full satisfaction of the undersigned, who agree thereafter to make no further claim on Russell & Company under warranty"; the "possession" therein mentioned is held to mean a possession coupled with a possibility or opportunity of using or testing the property for the uses and purposes to which it is to be applied. (*Harrison v. Russell & Co.*, 624.)

2. A provision in a contract that: "No promises, whether of agent, employee, or of attorney, in respect to the payments, and security, or the working of the machinery named, will be considered binding unless made in writing, ratified by the home or branch office," does not prevent the company's agent waiving written notice by going to the place where the machinery is being operated, and taking charge of the machinery and working on it with a view to

SALES (Continued).

putting it in a condition so that it will comply with the warranty. (Harrison v. Russell & Co., 624.)

8. The purpose of notice to the vendor of defects in the machinery under a contract of warranty such as in this case is to enable a vendor to send its agent or employee to the property and put it in running order and remedy defects, and when that purpose has once been served, and the agent or employee has actually gone and taken charge of the property and undertaken to put it in running order, the purpose of notice is served, and it becomes immaterial whether any notice has been given at all. (Harrison v. Russell & Co., 624.)

SHEEP.

See Animals.

SPECIFIC PERFORMANCE.

1. A contract to convey real estate will be enforced when it is shown that a deed was executed and left in the hands of the attorney of the grantor for inspection by the grantee, and after such inspection the grantee was willing to accept the deed, and had already paid the purchase price. (Robbins v. Porter, 738.)

2. A deed properly executed and left with the attorney of the grantor of real estate is sufficient to remove the bar of the statute of frauds in an action for specific performance where the purchase price has been paid. (Robbins v. Porter, 738.)

3. Where the evidence is conflicting and the case is tried to the court, and it appears from the transcript that the judgment is fully justified by evidence, under a long-established rule of this court, even though the case be for specific performance, the judgment will not be reversed. (Robbins v. Porter, 738.)

4. A complaint that fully sets out the contract for the conveyance of real estate, although the original contract was verbal, that is afterward merged into a different contract which is evidenced by a deed left in the hands of the attorney of the grantor for inspection of the grantee, is sufficient upon which to base a judgment for specific performance. (Robbins v. Porter, 738.)

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTES.

1. Before a legislative act is held unconstitutional, it should appear beyond a reasonable doubt that it infringes some provision

STATUTES (Continued).

of the constitution. Section 18 of article 3 of the state constitution prohibits the legislature from revising or amending any act by mere reference to its title and commands that the section as amended shall be set forth and published at full length. (Noble v. Bragaw, 265.)

2. Said section of the constitution does not require the whole act containing the section amended to be republished in full; it only requires republication of the section amended. (Noble v. Bragaw, 265.)

3. Two or more laws relating to the same subject, or different parts of the same subject, are not necessarily amendatory to each other within the meaning of the provisions of said section 18 of article 3 of the constitution, although they may be construed *in pari materia*. (Noble v. Bragaw, 265.)

4. Under the provisions of said section 18, article 3 of the constitution, a repeal may be made of a certain section or of an entire act without republishing the whole of the same, as said section of the constitution has no application to repeals, but only to revisions and amendments. (Noble v. Bragaw, 265.)

5. Section 39 of the act of 1905 provides, among other things, that its provisions should not be so construed as repealing any provision of the act of 1901 not inconsistent with or in conflict with the provisions of the act of 1905, and then declares that the remaining provisions of the act of 1901 and the act of 1905 should be construed together for the purpose of carrying out the objects sought by each, to wit, the eradication of contagious and infectious diseases among the livestock in the state. That is only an announcement of the legislative intent and correctly states the rule applicable to the construction of two acts or two laws bearing on the same subject. (Noble v. Bragaw, 265.)

6. The act of 1905 abolishes the office of state sheep inspector and his deputies, and in their place creates the office of state veterinary surgeon, assistants and livestock inspectors, and to that extent repeals the act of 1901. Said act of 1905 prescribes many of the duties of said last-mentioned officers, and in addition requires them to perform all of the duties required by the act of 1901 to be performed by the state sheep inspector and deputies not repealed by said act of 1905. (Noble v. Bragaw, 265.)

7. Neither express nor implied repeals come within the constitutional inhibition contained in said section 18, article 3 of the constitution. (Noble v. Bragaw, 265.)

TECHNICALITIES.

One who relies on technicalities must be held to observe technical rules. (*Jackson v. Barrett*, 465.)

TAXATION.

See Officers.

TRESPASS.

See Animals, 5-11.

TRIAL.***Reopening Case for Further Evidence.***

1. Question as to power of the trial court to reopen a case for the introduction of further evidence after adjournment of the term at which the case was tried and submitted; reserved. (*Brown v. Newell*, 166.)

Instructions.

2. Where the instructions to the jury fairly state the law on all the issues involved, it is not error to refuse requests of defendant, even though they may be a repetition of the law of the case. (*North & Douglas v. Woodland*, 50.)

3. An instruction that leaves the questions of fact to be found by the jury and only suggests the law applicable in case they find certain facts to exist, is not objectionable on the ground that it assumes that certain facts do exist. (*State v. Wright*, 212.)

4. Under the provisions of section 7877 of the Revised Statutes, it is not error for the court to refuse to instruct the jury to find the defendant not guilty; the court may advise the jury to acquit the defendant, but the jury is not bound by such advice. (*State v. Wright*, 212.)

5. Where the instructions, taken as a whole, amply and fully state the law of the case, the judgment will not be reversed, it being the duty of the jury to consider the entire charge, even though there may have been an instruction partially erroneous, where it is evident that such instructions did not mislead the jury. (*State v. Bond*, 424.)

6. Where the court fairly covers every point in the case by instructions given on its own motion, it is not error to refuse to give instructions requested by counsel for the defendant covering the same point and questions. (*State v. Cotterel*, 572.)

See Criminal Law; Judgments, 2, 3; Reference; Venue.

VENDOR AND VENDEE.

1. Where H. enters into an agreement with H. and G., whereby it is agreed that H. will pay \$7,100 for a certain mining claim, and pays in cash \$100 thereof, and agrees that the balance shall be due February 3, 1905, and that H. will pay the expense for procuring a patent to said mining claim, and that time is of the essence of the contract, and that thereafter, on February 3, 1905, H. deposited the \$7,100 with the bank, as provided by the escrow agreement, with instructions to hold the same until the receiver's receipt for the patent of the mining claim has been issued, and thereafter the receiver's receipt is procured and filed with said bank by H. and G. *Held*, that the bank was justified in paying the money over to H. and G. after said receipt was so procured. (*Hunt v. Capital State Bank*, 588.)

2. Where under an agreement for purchase of a mining claim, H. agreed to pay the cost of procuring a patent to said mining claim, and H. and G. proceeded and procured the patent, and accepted the purchase price from the escrow holder, and declined to return the same to H. on his taking the position that they had not fulfilled their agreement. *Held*, that H. was entitled to his deed from the grantors and legally relieved from the payment of any further sum. (*Hunt v. Capital State Bank*, 588.)

See Specific Performance.

VENUE.

1. The provisions of said section are self-executing, and the legislature by failing to provide, by proper legislation, that the prejudice of the judge is a cause for a change of the place of trial, cannot nullify the provisions of said section and thus compel the trial of a case before a prejudiced judge. (*Day v. Day*, 556.)

2. Section 3900, Revised Statutes, was enacted before the adoption of our constitution, and provides three grounds for a change of venue, but does not make the prejudice of the judge one of said grounds. (*Day v. Day*, 556.)

3. Section 4125, Revised Statutes, provides among other grounds, that a change in the place of trial may be had when from any cause the judge is disqualified from acting and, although enacted prior to the adoption of our constitution, is broad enough in its terms to include the disqualification on the ground of prejudice of the judge; and the constitution makes prejudice a ground of disqualification. (*Day v. Day*, 556.)

VOLUNTARY ASSOCIATIONS.

See Associations.

INDEX.

WARRANTS.

See Counties, 4-8.

WARRANTY.

See Sales.

WATERS AND WATERCOURSES.

Appropriation—Transfer of Title and Possession.

1. Where H. in 1899 settled on unsurveyed public lands and opened up an old ditch which had been constructed and used by a previous settler, and put in a headgate and conveyed the waters of a stream one hundred and fifty feet to and upon the lands claimed by him, and in the following year extended the ditch so as to better distribute the water over his claim, the water right so acquired is entitled to date from the time when the water was actually delivered upon the ground for the use of which it was diverted. (Brown v. Newell, 166.)

2. Where B. entered into an agreement and contract with H. for the purchase of a claim or squatter's right on unsurveyed lands of the United States, and the ditch and water right belonging thereto and used therewith, and paid a part of the purchase price, and was thereupon let into possession which he held continuously thereafter, and two years later received a deed from H. for such property, B.'s chain of title will not be broken by such contract and change of possession so as to allow an intervening appropriator a priority over B.'s water right. (Brown v. Newell, 166.)

Mandamus to Compel Delivery of Water.

3. Where several land owners contract and agree among themselves to unite in interest and construct their own ditch or lateral, and make a joint application to a ditch company for sufficient water for all their land as one applicant, they may join as plaintiffs in an action to compel the water company to deliver the quantity of water applied for at their headgate. (Helphery v. Perrault, 451.)

4. Where several parties agree among themselves to unite in interest and jointly apply as one applicant for water for irrigation purposes and to use and apply the water in rotation, the fact of joinder and rotation in the use of the water are not valid and sufficient grounds on which the water company may refuse to furnish water to them at their common headgate. (Helphery v. Perrault, 451.)

5. The times and order of use and application of water by several land owners under the same lateral to their respective tracts of land are matters of no concern to the water company where the

WATERS AND WATERCOURSES (Continued).

several users by agreement among themselves distribute and use the water at the times and in the manner agreeable to them, and the company has no duty but that of seeing that the requisite quantity of water flows through the headgate into the consumer's ditch. (*Helphery v. Perrault*, 451.)

6. Complaint in this case held sufficient to sustain a cause of action and not demurrable for the misjoinder of parties plaintiff. (*Helphery v. Perrault*, 451.)

Dams, Booms and Logging.

7. Under the provisions of section 835, Revised Statutes, the construction of any dam or boom on any creek or river in this state that will unreasonably delay or hinder the passage or floating of timber down the same is prohibited. (*Potlatch Lumber Co. v. Peterson*, 769.)

8. In the enactment of section 5210, the legislative intent was to make the provisions thereof applicable to all streams not navigable in fact. (*Potlatch Lumber Co. v. Peterson*, 769.)

9. The construction and use of booms is a necessary adjunct to the floating of logs, and the right to float logs down a stream carries with it the necessarily resultant right of employing some reasonable means for intercepting them at their destination. (*Powell v. Springston Lumber Co.*, 723.)

10. Under the provisions of section 835 of the Revised Statutes, it is made unlawful for any person to construct a dam or boom on any creek or river of this state without connecting therewith a sluiceway, lock or fixture sufficient to permit timber to pass around, through or over the same without unreasonable delay or hindrance. (*Powell v. Springston Lumber Co.*, 723.)

11. One who constructs a boom or obstruction "across" a navigable stream of this state so as to "prevent" others driving logs past such boom or obstruction is liable in an action to abate the same as a nuisance and for damages caused by its maintenance. (*Powell v. Springston Lumber Co.*, 723.)

See Navigable Waters.

WILLS.

Under the provisions of section 4831, an order by the probate court refusing to admit a will to probate is appealable. (*Matter of Paige*, 410.)

WITNESS.

Competency and Credibility.

1. Under section 5957, Revised Statutes, which provides that persons "of unsound mind at the time of their production" cannot be

WITNESS (Continued).

witnesses, a person who can apprehend the obligation of an oath and is capable of giving a fairly correct account of the things he has seen or heard is competent as a witness, although he may be afflicted with some form of insanity. (State v. Simes, 310.)

2. The examination of the person offered as a witness for the purpose of testing his competency should be made with special reference to the scope of inquiry and subject matter about which the witness is to testify. (State v. Simes, 310.)

3. Incapacity to give intelligent and legal consent to the commission of an act does not necessarily imply incapacity to thereafter correctly and truthfully narrate the facts constituting the commission of the act. (State v. Simes, 310.)

4. Where objection is made as to the competency of a witness to testify, the court should examine the witness for the purpose of determining his competency, and may call and examine other witnesses touching such question. (State v. Simes, 310.)

5. After the court has determined that a person is competent to testify as a witness, the credibility of the witness immediately becomes a question to be determined by the jury. (State v. Simes, 310.)

Privileged Communications.

6. Since the statute, section 5958, subdivision 4, Revised Statutes, authorizes the patient to waive the privilege of secrecy imposed on his physician, and does not fix any specific time at which such waiver can or must be made, no reason is discovered why the waiver may not equally as well be made by contract and in advance of the relation of physician and patient arising as at the time of the trial (Trull v. Modern Woodmen of America, 318.)

7. As to whether or not the privilege of secrecy granted by statute is a personal privilege attaching only to the person of the patient or can be waived by his heir or legal representative, *quære*. (Trull v. Modern Woodmen of America, 318.)

8. Communications which pass between one who is merely acting as a conveyancer or friendly adviser and the grantor or grantee are not privileged communications under the provisions of subdivision 2 of section 5958 of the Revised Statutes, which protect communications which pass between attorney and client in the course of professional employment. (Later v. Haywood, 78.)

Examination of Witness.

9. The action of the trial court in permitting leading questions is largely discretionary, and is properly exercised in the allowance of such questions in the examination of a feeble or simple-minded person. (State v. Simes, 310.)

WITNESS (Continued).

10. The courts will be liberal in allowing a broad range of inquiry on cross-examination, and this rule is especially and peculiarly applicable when it comes to the cross-examination of that class of witnesses commonly called experts. (*Trull v. Modern Woodmen of America*, 318.)

11. Certain incompetent and inadmissible statements made by the witness that are disallowed and ruled out by the court, and the jury admonished not to consider, and which are repeated by the witness and the same action taken thereon by the court, reviewed, and held, that although reprehensible on the part of the witness, they are not sufficient grounds for a reversal of the judgment. (*State v. McGinnis*, 336.)

Compensation of Witness.

12. Under the provisions of section 6039, Revised Statutes, a witness who resides in an adjoining county and more than thirty miles from the place of trial, is not obliged to attend in response to a subpoena; but the privilege of disobeying the subpoena is personal to the witness, and if he sees fit to waive the privilege and attend and testify, he is entitled to his mileage for actual and necessary travel within the state, the same as any other witness who has attended under compulsory process. (*Anderson v. Ferguson-Bach Sheep Co.*, 418.)

13. The wife of a litigant is entitled to mileage and *per diem* the same as any other witness would be for the same travel and attendance. (*Anderson v. Ferguson-Bach Sheep Co.*, 418.)

See Accomplices.

WRIT OF REVIEW.

See Certiorari.

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